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WE do allow the Printing and Publiſhing of the REPORTS in the Court of King's-bench at *Weſtminſter*, in the Reign of our late Sovereign Lord King *CHARLES* the II^d^. Taken by *Joſeph Keble* of *Gray*'s-Inn, Eſq;

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REPORTS

IN THE

Court of Kings Bench

AT

WESTMINSTER,

FROM

The XII to the XXX year of the Reign of our late Soveraign Lord

King Charles II.

Taken by *Jos. Keble* of *Greys-Inn* Esquire.

The Third Part:

Containing the 24th 25, 26, 27, 28 & 29th Years.

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A New *Alphabetical Table* of the *Caſes* in this *Third Volume*, where thoſe Caſes in which the Court did not give Judgment, the firſt Motion or Arguing, are carefully referred to from Page to Page till Judgment was given, being the *Adjournaturs* and *Ante's* which were omitted in the former *Table*, may readily be found.

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FINIS.

DE
Termino Paſchæ,
Anno 1672. in *B. R.* 24 *Car.* II.

Wedneſday, *Apr.* 24.

Hale Chief Juſtice. {*Twiſden*, *Rainsford*,} Juſtices.

Monke *againſt* Clayton.

(1.) EX motione Jones, for one Gayle Aſſignée of Commiſſioners to ſtop having money out of Court, the Plaintiff being a Bankrupt ſince the Judgment, which Winnington oppoſed on a Caſe in C. B. where between Verdict and Day in Banke the Plaintiff becomes Bankrupt, it was adjudged in C. B. on debate that Judgment could not be ſtayd, the Aſſignee of the Bankrupt being a ſtranger, and Bankruptſie had been pleadable in Bar, which is now waived by the Writ of Error, but per Curiam the Plaintiff is delaid of Execution, and then its all one as if he had no Execution within the intent of the Statute. But per Twiſden in the Dutchy, it was reſolved he may bring a Scire facias as an Aſſignée more eſpecially, or debt on the Judgment, which the Bankrupt had againſt any other perſon. The Court would have Ordered the Plaintiff to put in ſecurity, but the Judgment being affirm'd before the Aſſignment, viz. the day of Commiſſion ſued out, the money was order'd to be delivered to the Plaintiff out of Court, no Execution being ſued out, unleſs a ſpecial Scire facias be this day, Poſt.

1 Cr. 166. Bankrupt. Modern 93.

Lord Peterborough *and* Lord Mordant. *Thurſday*, Apr. 25.

(2.) IN Evidence to a Jury at Bar in Iſſue out of Chancery, the Plaintiff made Title to a Deed ſuppoſed, but not directly proved to be ſuppreſſed, a Copy whereof was in the hands of Sir Thomas Alſton a Purchaſor, which he had of Nicholas Lord Peterboroughs Council, which he never examin'd, nor could ſwear a true Copy, therefore the Court refuſed it as

Deeds. Modern 94.

Evidence, but agreed that Attorneys A. B. Notes, or Memorandum proved a Copy, may be good. And Hales Chief Justice said in Kenric and Hopton's Case a Copy of Deed suppressed was proved a true Copy, And could not else be admitted, also a Copy by A. B. and in letters may so be admitted, and was last Assizes in Norfolk; and for want of proof the Plaintiff was nonsuit.

Cutts *and* Pickering. *Friday*, April 26.

(3.) Devise. 3 Bulst. 184. pl. 82. Per Cooke. Hub. 323. Devise Fitz. 21

A Will in Evidence on Issue out of Chancery, appear'd to be by Sir John Cutts Tenant to him and his Heirs of the Bishop of Ely for three Lives as to one Manor, on Bargain and Sale first made for 99 years, if the three Lives so long live, in trust to such uses and appointments as by Sir John Cutts last Will should be, which was made to enable a Devise, by Hyde Chief Justice. But the question was upon another Manor supposed by the Plaintiff to be devised for 80 years to the Defendants wife (if she lived so long) and that the later words if she so long lived were razed, which the Jury believed, and so a Verdict for the Plaintiff.

Cole *versus* Levingston. *Saturday*, April 27.

(4.) Remainder.

The Plaintiffs Title is by Lease of Kelsy under-Lessee of Crook, &c. Heirs of Sir Peter Vanlore the elder and younger. Serjeant Maynard pro Plaintiff. Old Sir Peter conveyed to the use of himself for life, to the first Son for life, with Remainder to them particularly in tail, as to five parts proviso if Mary Powell, or Henry Sackvil, and Peter, and Anne, and Mary Glenham, or Jacobin and Cæsar, or the Vandebludes, or all the Daughters of Sir Peter Vanlore Junior die without Heirs of their body, then their part or parts according to that proportion to go the Survivors and their Heirs, and all this is by Covenant to stand seized in 1651. and after the death of the two sisters Glenhams and Henry Glenham, and after the death of Vandeblude, then the Lady Powel levies a Fine to Basset of her part, Jacobin and Cæsar were then dead, but left Issue; after in Jan. 1651. by Indenture Quadripartite, its agreed to levy a Fine oct. Hill. to Levingston, found to be of the Lady Powels fifth part, and at the same time there is a Fine and a Common Recovery of a fifth part generally, and of a moyety, all which are to come to Skinner, who claims under these Conveyances. Sackvil Glenham conveys a tenth to Gosnal, and he to Marriot in 1656. afterwards Anderson of moyety of a fifth part levies a Fine to the use of Abraham Vandebude, and

and the same year Peter Glenham sells a tenth part to and a Fine is accordingly.

May, 1653. Anderson, Cæsar, and Levingston seised of a fourth part, by death of the Lady Powell, levy a Fine to Skinner, after by Act of Parliament reciting the Lady Powels Fine to be by fraud of the fifth part, it is enact that the Fine and Deed of Uses and the Warranty be void, and that it shall be lawful for those that have right to enter and enjoy, as if no Fine were, that security to Levingston be void. And afterwards another Act reciting Sackvil Glenham was indebted, in 16 Car. 2. cap. saving the rights of others, all the Trustees are Defendants, and each heir is to entitle themselves, a fifth part is absolute pro Plaintiff, and as much of the fifth part of the Lady Powel, as any other Cept within the whole fifth part, for no Remainder of any part of the Lady Powels Interest can be till the whole Cept is spent, or if it have any effect, its but contingent, for during life of the Survivor, other cannot take, so when the Cæsar died in the life-time of the Lady Powel, then four parts are dead and extinguisht, and cannot go over, and whatever Levingston hath by others part than by his own, is extinguisht before the Act of Parliament, and can never rise, for when such a Remainder is vested were it per Capita, when that person dieth without Issue, there ends that also as to the forfeiture by those who had but a fifth part levying a Fine of a fourth. Upon the first limitation of the Deed there can be no question, but on the being Joyntenants for life, with several Inhertiances of the fifth part; so when H. Glenham died without Issue, his part had sunk and died in the Reversion, and could not go over, as was adjudged in Nevil and Nevils Case, and agreed in Littl. and that no cross implied Remainder can be, and the proviso doth not make any alteration, being intended to distribute the Estate to the five Children, and each Cept or Tribe, and that no other should have any thing till the Cept of one wholly fail'd, and had it been said that though Henry died without Issue, that no other should take until his other Brothers died without Issue, it would be evident that it should not go over, though he hath not appointed how it should go, thus the Inheritance of John Vandeblude discended to his Son, but when Peter Vandeblude died, his Inheritance reverts to the Heirs at Law, and cannot go to Abraham; the same of the Glenhams parts, and then when the Lady Powel levied a Fine, her fifth setled in Skinner, but these being made void, the quale & quotum of this part is the question. As to the quality this is a contingent Remainder, of necessity, there being

no person to vest in till the Survivorship is known, therefore being by Covenant to stand seized, leaves the Estate as it was before in the Heir, so none of the six that died before her, nor their Heirs, can never take, these being words of Purchase, but all that is extinguisht in the heris Estate, and consequently the Lady Powels part is to be divided among six. Annes Fine being after discontinuance made by the Fine of the Lady Powel to Basset, of her Estate tail, destroyed her possibility, and is not remitted by the Statute that voids the Lady Powels Fine, so Levingstons Claim is to be set aside, the Act having no operation, on any Fine levied by Levingston, and as to the rest the quota pars by the Act is to every Cept abating what is lost by death of such as died before the Lady Powel, this not being given to the Survivor and Survivors, but according to their several parts aforesaid, which cannot be a fifth part, here being but four, the other is sunk, and it cannot be intended to go according to the branches of the several Cepts, and there are no parts between Joyntenants, though there be between Parceners; so there is no Rule to limit this Estate, and if ones share do once remain, as when Henry Glenham died, his part vesting whither per Stirpes, or per Capita, it ends there, and no second vesting or superstructure can be on the others death, which would make a perpetual Fraction, therefore as 1 Cr. 577. & 1 Co. Rector of Chedingtons Case, the whole proviso is void, and the whole part of the Lady Powel comes to the Plaintiffs Heirs at Law by the first limitation, which had it been without that Clause, according to their parts respectively it would have made twelve Joyntenants with several Inheritances, which had not been so inconvenient, as now also the Survivors only are to take, which cannot be now divided by fifths, four of six being dead before the Lady Powel; also by the first limitation the Freehold survives, without which the Inheritance alone cannot after be limited another way, which would destroy both Freehold and Inheritance, like Richils Case and Mildmays Case: also Anne and Mary have no Estate by the first Limitation till the Heirs males of their Cept die, but by this Construction they would, therefore its best to damn such novel Inventions in the beginning, as Limitations for life and to the next heir for life, &c. is endless &c. this was the reason of destroying Perpetuities for such inconveniences, and the limitting terms by way of Remainder; and thus having no good effect in literal or legal sense, he pray'd Judgment for the whole fifth part of the Lady Powell, which by Hale Chief Justice will be void, if only the seventh part of her fifth part

part be due to the Plaintiff; alſo he prayed Judgment for Henry Glenhams third part of the fifth part which ſurvived to Peter and Sackvil, and their Fines of the tenth of the whole do cut off contingencies as to the third part of Henry, ſo that may come to the Plaintiffs, being not conveyed away by their Fines, but as to Cæſars part, one whereof is dead, and another alive, the Plaintiff claims nothing. As to the Vandebludes, Abraham and Peter have levied a Fine of the whole fifth part to Lee, 1656. but this being a forfeiture for Peters third part, the Plaintiff claims that. Hale Chief Juſtice conceived a Contingency of Peter Glenhams part may ariſe, and ſo makes an alteration; and he conceived though the voiding the Lady Powels Fine will not revive Levingſtons part as to him, yet as to his Feoffee or Conuſee it doth, as if the Lady Powell had levied no Fine; but if the proviſo be wholly void, then all Contingents are deſtroyed; alſo its plain, that after once veſting, there ſhall be no ſecond ſubdivided Remainder by vertue of the proviſo, but as Lampets Caſe, all the Remainders are in contingency, till the ſurvivorſhip. Alſo to ſurvive according to their ſeveral parts aforeſaid, is idle and void, and ſhould go to the Survivors only; alſo the Lady Powels part muſt veſt in the ſeven Survivors, if any, for it cannot veſt in thoſe are dead; and the deſign of the Conveyance was to keep the whole fifth part within the Tribe, to which it was limited, which is miſtaken and fumbled, and in caſe of alienation is divided by fourths, and 20 Jac. Callards Caſe had as much an intention as this, where the wife takes, as Windhams Caſe, diſtributive on death of each to avoid confuſion, ſo 2 Cr. 651. Guilbert and Witty, the conſequent whereof is on the Lady Powels death a ſeventh part reverts, three to the Plaintiffs, the reſt to the other Tribes ſurviving; alſo the diſtributive, or, &c. was intended on a croſs Remainder, which cannot be, and to ſalve all ſhall be rejected, and when Henry Glenham dieth without Iſſue, there goeth to each Survivor a ſeventh of a third of a fifth, which is more than a tenth of a fifth, of which the Fine was levied, and this is 105th part of the whole; alſo the Judgment muſt be prayed for parts, therefore cannot be releaſed for part to prevent Error, and after all partition muſt be, Poſt.

1 Anderſ. 352.

Ingraham

Ingraham *and* Froud.

(5) Escheat.

EX motione Stroud for execution on a verdict to prevent the Defendants seisin, which was by title under P. the youngest Brother by discent from A. the eldest, or as heir in tail, supposing the Plaintiff, who claimed as issue of B. the middle Brother, who was attaint of Felony and executed in the life time of A. disabled, but per Curiam this is no title, for the discent goeth to the issue of B. or must escheat being in case of Attainder. Contra in case he was an Alien.

White *and* Drake. *Monday* April 29.

(6) Assurances.

THe Plaintiff in ejectment claimed as Assignee under marriage settlement of Drake of lands in Amersham in the County of Bucks, which being on precedent agreement on treaty of the marriage and portion paid, per Curiam is sufficient against the purchasor though there were no Articles, but Articles sealed by trustée not by Drake or his wifes father Spring were produced and verdict for the Plaintiff by the clear opinion of the Court.

Secondly the Plaintiff claimed by Conveyance of Sir W. Drake to Bernard 19 Dec. 20. Car. 1. in tail of a Term, and 4 Feb. to Denton, &c. in fée to such uses as Drake should declare by his last Will and Testament in writing and appointment made &c. Hale Chief Justice said that the trust of a term in gross disposed to A. for life, after to his wife for life, after in tayl to A. is void for the entail, and goeth to the Executors of A. also Sir Ed. Cook made a conveyance to the use of the feoffor and his heirs with power to the feoffor to devise which was good for to prevent Capite tenure, and upon Cleres Case a feoffment to the use of the Will results all to the feoffor and his devise is as owner of the lands, but a feoffment to the use of such as A. appointed by his last Will, is power that may be annexed to the result of the inheritance, and a general devise without reference to the feoffment will be void. Betwéen Lydal and Vandlore 20 Jac. a lease assigned in trust on marriage to himself for life, then to his wife for life, and to his issue was agréed fraudulent for his life on a special Case referred to the Judges out of Chancery, and so would this in question were there no inheritance conveyed, but here though the Term be 19 Decemb. and inheritance 4 Febr. after, yet all is but one entire declaration of the entayl, and were the Term first conveyed and after the inheritance in a day or two they constantly in Chancery being one on agréement, though executed at several times, hold it all one as

1 Inst. 272.

the

the Term waiting on inheritance, as 1 Cr. Turpin and Snape.

Fowler and North. *Tueſday*, Apr. 30.

The Plaintiff claimed by extent on a Statute to Sir Samuel Jones father and in evidence to a Jury at the Bar it was obſerved, Firſt on power to ſettle a joyn-ture, one was ſettled with power of revocation and after revocation a new one made which the Plaintiff upon Beckets Caſe, 9 Jac. in the Exchequer conceived not good, the power being once executed, but per Curiam in the Lady Haſtings Caſe it was reſolved the power may be executed toties quoties, and ſo by Hale Chief Juſtice it was reſolved before upon as great a ſettlement as any Subject in England hath without any power to limit new uſes, and Beckets Caſe was a power to revoke and limit new uſes, and the new uſe was limited with power of revocation and new uſes limited after, and Tanfield who argued the Caſe, held the firſt power executed and a new power to limit new uſes could not be, and on this the Court were divided but never doubted the poynt in queſtion. And in the Lady Haſtings Caſe it was held a new power and uſe may be limited, elſe moſt ſettelments on children would be defeated, which are often revoked and new ſetled; it hath been doubted whether by power to limit new uſes by the ſecond deed a man may without notice taken of the firſt limit new uſes, but if the firſt be revoked he may execute another toties quoties, as if the firſt deed be to revoke by four witneſſes, and a ſecond deed with power to revoke by two witneſſes it might be a queſtion, yet by the now Lord Keeper Bridgman, Sarjeant Rolls, and Sarjeant Pheſant, when they had firſt choice it was held that a man may limit new powers and eſtates by the ſecond power alone in Winſtamleys Caſe, which had only a power to revoke, alter, and change, and no power to limit new uſes. 2. The Court agreed that a clauſe of reentry for aliening or marriage again, contra to the power, its a Condition, but if to ceaſe and be void on the ſecond marriage its a Limitation. 3. The deed was between the Lord Bedford and Scaven as truſtees of the Counteſs of Carliſle, the Lord refuſed to have a box opened in which the deed was, & per Curiam they cannot force it more than they can force a Solicitor to ſwear, nor would the Chancery compel the purchaſor to ſhew his deed of entail though great circumſtances were that it was in his hands; alſo joyntres ſhall never be forced there to produce the deed till joynture confirmed, and the Plaintiff was nonſuited thereupon.

(7) Powers. Co. Lit. 272. Dyer 372. pl. 9

Lane 118. pl. 88.

Cole

Cole *and* Forth. *Wednesday*, May 1.

(8.) Waſt. Modern Rep. 94. pl. 4.

ON Iſſue out of the Chancery to try waſt here after Verdict and Judgment in the Huſtings, in London, affirmed in B. R. and after in Parliament, the Court adviſed to be conſiderate, being directly contrary to 4 H. 4. cap. 23. and per Curiam was ſo adjudged in Limry and Langhams Caſe, that action ſur Statute lieth, though it be not within the Statute for a Præmunire, but the Plaintiff being under an Injunction till Trial, and an expreſs Order againſt his conſent to try, the Court proceeded to Trial.. 2. The pulling down an old houſe, and building a new one, and the altering a Will is waſt, and the very caſe in queſtion pulling down a Brewhouſe and building Tenements is waſt, and on iſſue no waſt made, reparation or rebuilding cannot be given in Evidence, but it muſt be ſpecially pleaded in Bar, as Hubbard, Darcy and Askwith, and ſo the Court inclined, in caſe of a new built houſe where none was before, but Mr. Attorney Finch ſaid, there were as many authorities that this was no waſt, but for melioration, as that it was, and that it was ſufficient Evidence, alſo per Hale and Rainsford, waſt in the houſe is ſo of the Curtelage, contra per Twiſden, ſo that waſt in the Hall is ſo for the Houſe, and verdict pro Plaintiff 50 l. ſingle value.

10 H. 7. 2. Waſt 143.

40 Aſſ. 22. Waſt Br. 107.

..... *againſt* Aſhton. *Thurſday*, May 2.

(9.) Adminiſtratrix.

MR. Solicitor prayed a Prohibition for the Daughter Adminiſtratrix, being ſued by the Mother for Repeal on Sir George Sands Caſe, but per Curiam on Collins Caſe, 18 Jac. on a Commiſſion of Delegates, 2 Cr. the Wife being reſiduary Legatee, in the Will annext the Court would ſtay nothing, for reſiduary Legatee ought to have it before the next of kin, but elſe the Statute being in the Diſjunctive, the Ordinary hath executed his power. Adjornatur.

Dyer 372.

Elliot *and* Crumpe.

(10.) Tail.

IN Evidence at Bar in an Ejectment of ten houſes in St. Martins, on Leaſe of Sir Thomas Lee, who claimed under ſettlement by Deed and Fine to the uſe of Minter and B. his Wife for life, Remainder to Francis Lee and Elizabeth their Daughter his Wife, and to the Heirs which he begat on her body, which per Curiam is an entail both in Huſband and Wife, as Littl. the Remainder to Minter in fee of Swan-

Cloſe

Cloſe againſt which the Defendant under the Lord Salisbury, contended that the Fine levied by B. and Minter to one Haughton ſur conceſſis, which was the ſame Term a Ret. preced. H. 7 Jac. was a forfeiture, and ſo the warranty is a Bar to the Plaintiff who claims as Heir of Woolly Lee dead, 1644. who was Heir of Francis, but per Curiam B. not dying till 1646. the warranty could not diſcend till the death of B. alſo the Fine of Francis Lee with warranty is but lineal, and in both caſes he in Reverſion may enter in five years of forfeiture, or in five years after the death of Tenant for life, ſo as to this the Defendants poſſeſſion being anſwered by the Plaintiffs Infancy and priviledge of the Defendant, the Title was for the Plaintiff; but it appearing there were two Swan-Cloſes, and the Plaintiff could not diſtinguiſh, he was non-ſuit.

Samin *and* Norton & *uxor ejus.*

(11) IN Debt on Obligation by Feme, while ſole to ſtand to an Award; the Defendant pleaded, that before the Award he married her, which the Court conceived no Plea, but adjornatur, the Parties agreeing to enter new Bond. 7 H. 6. per Strange.

Osborn *and* Barton. *Friday,* May 3.

(12) IN Ejectment, the queſtion was on a Pedigree, if the wife of Matthews, Leſſor of the Plaintiff, be Heir to Sir Thomas Treſham, who had Iſſue four Sons, Francis, Lewis, Thomas, and William, ſay the Defendant, William was the eldeſt, and Thomas the youngeſt died without iſſue. Lewis had iſſue Tobias, whoſe iſſue the Plaintiff is; Francis was dead, and attainted after death of Sir Thomas, 3 Jac. but had iſſue yet living, and ſo the Plaintiff was non-ſuit as Heir to Lewis, the Land being Eſcheated.

Player *and* Bringham.

(13) HOwel Recorder of London prayed a Procedendo on a Bylaw, that none exerciſe the Trade of a Broker, till ſworn by the Aldermen, in pain of 20 l. which is removed out the Mayors Court. Winnington excepted that no cuſtom is alledged thus to reſtrain; and Hale Chief Juſtice ſaid, it was hard to make the Suit in every Caſe in the Mayors Court, which was but ſeldom done heretofore, and cuſtoms are now too frequently return'd, and therefore fitting to be tried here, and not the City to try their own cuſtoms. Et adjornatur.

Player *and* Broadnox. *Saturday*, May 4.

(14) ON Habeas Corpus it appear'd the City of London by Custom have the ordering of Carts, and under them the Governors of Christ-Church-Hospital, and that By-law is, That no Cart be allowed to work in the City above the number of 420, provided Country-Carts, or for private persons not working for hire, or retailing fewel may work; and that the Defendant pro lucro suo did work a Cart, being a Wood-Monger, whereupon they imprisoned him on a plaint for the penalty. Coleman prayed no Procedendo might be, because a By-law barely cannot restrain to the number, or to do it without Licence, and here is no sufficient custom alledged, there being none in the Plaint in the City, but only here on the Habeas Corpus, to which the party cannot plead, and this as Day and Savage is not a custom to be certified by the Recorder, but tried by the Jury, therefore should be alledged in the Plaint, also in Player and Jenkins it was adjudged a good By-law, contrary to which 1 Roll. 364. is express; also the Wood-Mongers are not within this By-law, for Car-men using not Carts for hire, but carrying their goods to their Customers for use of their Trade; and this is no nusance to the streets, not standing there for hire to incumber the streets. Pemberton for a Procedendo, that if there were no custom, an Action of the Case lieth, and its not traversable; also if a Wood-Monger be not a Car-man, its evidence on nil debet, but per Curiam though a Monopoly may be by By-law grounded on a custom, as in Rippon, yet not else, and the Return of the Custom here is sufficient, as on Concessit solvere, which is not said in the Declaration below, but on Error the Court will take notice of it, so as in Norwich where a Deed is confessed, but petit quod Inquiratur de debito, which doth not alledge any custom below, but only in the Return of Hab. Corpus; but Hale Chief Justice conceived a Wood-Monger may fetch Coles from abroad into the house, though they cannot send them forth, which Twisden and Rainsford denied, and said all is one; but it was agreed, That where a Custom or By-law enables one, it must be returned, contrary where by proviso that must be specially pleaded, or on nil debet, but the parties never intend to restrain bringing in, but only carrying out, which by the By-law must be by sealed Measures. Adjornatur.

Purfry

Purfry *and* Rogers.

TRespas and Ejectment on a demise of Shelton, a special verdict finds Samson Shelton seised and devised, thus, my Inheritance of my lands and houses I give to my wife, and if she have a son and cause it to be called after my name, then I give them to such a son after the death of the wife and the heirs of his body the remainder to the right heirs of the Devisor, she had Issue by Braughton so christened, and he is the Lessor of the Plaintiff, but after Isabel married Braughton, and before the son was born John Shelden bargained and sold to them and their heirs, and levied a fine as Heir to his brother the Devisor, this was before the birth of the son, and whether this Fine destroy the contingent Remainder or not, was the first Question; and by Sanders it doth not, but per Curiam here is an estate to the Heir on the Condition precedent. 2. It was urged that the Fine to baron and feme and their heirs doth not destroy the Contingency, because the Estate is not turned to a Right, Sed non allocatur, for had the Tenant for life surrendred, the contingent Remainder is destroyed without devesting, if the Estate of the wife be drowned there is no Estate to support the Contingency.. 3. Though this be in the Feme till disagreement, yet she being covert, 3 Cro. 315. Cordals Case, & Co. Lit. 28. a feoffment to the use of the Baron and Feme, and the Heirs of their bodys makes them tenants in tail if mesne contingency cease, but 3 Car. 1. Pigot & Smith Baron and Feme tenants for life the Remainder to the first Son of the Feme, she may enter notwithstanding his feoffment after his death, but if the contingency happen in his life time, the contingency to the son shall never rise, which per Curiam differs not from the case in question, for if a man conveys to the use of A. for life, the Remainder to the first, second, third, and fourth Son though there be a present confounding of the Estate, yet if the contingency happen it shall take, but if the Estate be altered that the contingency be gone for an hour, ex post facto, it is gone for ever, as if tenant for life reenter after feoffment, he doth not determine the contingency, and though the wife might waive the fine, yet the Defendant being a purchasor, 11 R. 2. Detinue Fitzherbet, a Right without remedy will not support a contingency no more than a Right of Action. 4. The Condition was to cause the Son to be called Samson Shelton not of his christen name, and sirname and therefore its sufficient his christen name be Samson Shelton, for a year or two cannot alter

(15)

1 Cr. 102.

the sirname, his Father being known to be Braughton; Hale Chief Justice said a Remainder to the first Son of John is good, but not to the first Son of John that shall be called William. Holt for the Defendant on 1 Co. Archers Case, be the particular Estate destroyed or suspended, Moor 339. pl. 459. Sir Moyle Finch, & 1 Co. 135. Chudlyes Case, the contingency is destroyed, & 3 Cr. 315. is contra to 2 Cr. 260. and hath been often denied for Law, which Hale Chief Justice agreed, also on 2 Co. 60. Wiscots Case the seisin of the feme of different rights being not by moieties but by intierty its all one, and its like, Lit. Sect. 637. Discontinuee reconveying to the Husband and Wife remits her to all where she is seised by intierty. 2. It is intended the child should bear the christen name and sirname, else he would not disinherit his brother John. The Court agreed here are no moyeties, but it must be drowned, for all the Estate being conveyed to them by intierties as in possession which amounts at least to a surrender though vendible by her after her husbands death, or however the reversion is in her till she disagree, which she cannot do now having joyned in a fine to the Defendant; and where there is tenant for life the remainder to the first, second, and third son, the remainder to the brother in tail, tenant for life, and he in remainder joyn in a fine, here is no discontinuance nor disclaiming, yet the contingency is extinct by the confounding of the Estates in the fee; this was not adjudged but agreed by the best Counsil about the Town. Also where, an Estate is limited as a remainder is here, or depends upon a particular Estate as a remainder, there can be no Executory devise, as a feoffment to the use of A. for years and then to another in fee is void and not executory as it was at Common Law when the use was in the feoffees. And Judgment for the Defendant nisi. As to the name, Hale Chief Justice inclined it was sufficient it appearing by the remainder limited to the devisors right heir that he meant not a son of his own as insient, &c. Twisden contra.

3 Readings 340. § 2.

2 Cr. 168.

Cook *and* Baker, *&c. Monday*, May 6.

(16) IN Action sur le Case against the Town of Uxbridge for taking toll of a Thursday market there, the Plaintiff made title by Conveyances under the Lord Derby to whom it was granted heretofore and allowed in 38 H. 8. & 8 Car. 1. in two several Quo Warranto's, and the Town disclaimed. Twisden Justice excepted because in the Count it was not said by grant, or prescription but on a seisin only. 2. It was said no Uxbridg-

man

man of the pretended Corporation can be witneſs, and ſo by Hales Chief Juſtice it was ruled in the caſe of London of Hawkers, and in Smith & Hancocks Caſe, no freeman could be allowed to prove a cuſtome of the City that was of the Corporation. Twiſden doubted notwithſtanding many receipts proved as a Corporation being not able to prove any Corporation, Verdict for the Plaintiff.

Sir Theophilus Biddolf *verſus* Sir Clement Clerk.
Tueſday May 7.

IN dett upon a Judgment by the Judges at Cliffords-Inn, the Defendant pleaded nul tiel record, and Jones prayed a Certiorari of the Court to remove the Record notwithſtanding the Act of Parliament, ſed per Curiam the tenor of the Record is all that is ſent for, or removed out of any Court on nul tiel Record pleaded, and the Court granted a Cerciorari, which doth not remove the Record it ſelf, for then no Execution could go below, And Hale Chief Juſtice ſaid, he had ſeen a Certiorari to remove tenorem tenoris Recordi, and the beſt way is to direct it Judicibus Curiæ, though Monday the Secondary kèp the books, but they left this to the Plaintiffs diſcretion. (17)

Spencer *and* Goodhew.

IN conſideration that the Plaintiff would ſuffer goods, to which he pretended title, to continue in the poſſeſſion of Pricat, he aſſumed not to eſſoin, which by Symſon in arreſt of Judgment is ill, that the Plaintiff hath ſhewed no intereſt in the Teſtator or himſelf being Adminiſtrator Jure uxoris of Evans, but being that the Plaintiff claimed them ut ſua, and intended to remove them its ſufficient after verdict, the Defendant promiſing they ſhould remain there pro uſu of the Plaintiff. Judgment for the Plaintiff. (18)

Marſhal *and* the Lady Pretiman.

MAinard upon the Caſe of Mr. Drake that married Wrights daughter, and gave a Judgment againſt him and his wife in the Common Bench, which the Court ſet aſide, 18 Ed. 4. 4. Error Br. 173. prayed that ſhe may be diſcharged of the Execution, and that a Scire facias may de novo Iſſue, becauſe ſhe was pretented to be married before Judgment, ſed non allocatur, for the Judgment againſt Drake was on confeſſion, but this againſt her as ſole, and ſhe (19) In Error Br. 137. P. 24 Ed. 3. 3. Error Br. 86.

she might have pleaded this alone on the Scire Facias, but being now taken in Execution they cannot ease her till sentence of the Spiritual Court for the marriage, especially the cause being there depending and she having brought an action as sole, by the name of Theodosia Adams and recovered since for want of proof of the coverture with Sir John Pretiman, but she may with her husband, as Williams Case, or in their names bring a Writ of Error and assign this for Error, but Marshal being dead this is not so examinable, and in trespas against A. B. &c. A. being Covert all brought a Writ of Error, and for it the whole Judgment was reversed, yet the Court erred not. Also Twisden said, Tr. 16 Car. 1. Feme Covert Infant levying a Fine it was reverst by Error, and the Court would not suffer the Husband to release, and so in Wortlies Case of the Temple, the Husband was disallowed to release Error, and so he should be here, to which the Court inclined and would do nothing else in it but refer it to the Secondary, for practise, and Twisden said an Audita Querela, was the way to relief on Hull, Smith & Ashes Case and on Barcock & Thomsons Case.

Clayton *and* Monk. Ante.

(20) Modern Rep. 93 pl. 1. MR. Solicitor prayed the Kings proces may take place against the assignée of Comissioners the Defendant being a Bankrupt which per Curiam cannot be unless seisure be made and returned by Enquest before the assignment; also this being not an immediate debt but in ayde of receivors who were joyntly bound with Monk, the Court refused to deliver mony till an Enquest be returned of this particular debt, though Clayton himself were Sheriff and would return none, Et adjornatur till notice to the Kings Attorney.

Dennis and Turbel and Curties.

(21) STroud except in arrest of Judgment in trover de 32 centenis udæ plumbi Anglice Lead-Ore, sed non allocatur, as de ponderibus Casei, Anglice Weighs of Cheese good, and Judgment for the Plaintiff.

Cane

Cane and ....

COleman prayed to waive an aſſignment of Error by Attorny on utlary after Judgment that they may aſſign Error in perſon there being a ſpecial demurrer entred on 7 H. 4. cap. 13. aſſigning this eſpecially for cauſe, which Hale Chief Juſtice doubted, but the party not having joined the entry was too ſoon and ſet aſide, and awarded to waive and aſſign in perſon. (22)

Seaman *and* Dee. Ante.

SYmſon conceived the Declaration well, and the Court inclined it was but a form, and the plea is ill of Judgment of 5000 l. for debt and intereſt for the ſame ultra quod, &c. for though a bond to pay intereſt hath been held good in Covenant on an Action upon the Caſe, and eſpecial aſſignment, yet no action of debt lieth for intereſt, and therefore it appearing here can be no debt the Judgment is not only erronious but void and Judgement for the Plaintiff, niſi this is intereſſe damni as the penalty, not intereſſe lucri, whereby the Acts of Parliament that uſury was unlawful were avoided after the day of payment is paſt, alſo the debt lieth againſt the Executor on contract and the Executor may retein for it, and ſo it was adjudged 20 years before, Palmer & Lawſons Caſe, all which the Court agreed. (23)

Brown *and* Shaſton.

IN a Scire Facias by tenant by Elegit to avoid a Statute extended on the Lands of Smith and after his death againſt tertenents, the Conuſees of the Statute being ſatisfied, the Defendants, Executors of the Aſſignée pleaded aſſignment of the Conuſees intereſt to J. S. under whom Norban was in poſſeſſion and Iſſue is on the poſſeſſion, becauſe there is liberari feci and actual poſſeſſion contrary to 28 Ed. 3. 12. Retourn on the Elegit which could not be the Lands being as Regiſter Jud. 71. ſeiſed by the former extent, ſed non allocatur, for though the Sheriff may take notice of the former execution, yet not of a matter in fact, but if the Sheriff doth execute the writ as he may if he will, the Plaintiff who it may be did not know of it, ſhall not be without remedy, and its all one as the ſetting forth an Eviction, for the liberari only enables to ſue &c. 2. It was ſaid the Iſſue ſhould be on the Aſſignment which (24)

which is the main, not on the possession, for the Action lieth only against such as had the Interest by the Statute, so 50 Ed. 3. 16. Scire facias is against the Assignee of all. And 21 Ed. 31. by Hale Chief Justice is that Scire facias must be against the party privy to the Conusance as the Conusee, as Error is against the Defendant on a Recovery, but the Tenants shall not be ousted without another Scire facias; and if this Issue be immaterial, the Plea is so, Verdict being for the Plaintiff, also the Conusee pleading the Assignment, cannot be taken notice of, unless in possession. Twisden said a Scire facias may be against the Conusee nec non to Assignees, Executors; also tender in Law must be to the Conusee, though the Assignee hath Interest in Equity, the Court agreed the Scire facias may be to all, but inclined it cannot be against the Assignee alone. But Adjornatur.

Ward *and* Clement. *Wednesday*, May 8.

(25) EX motione Jones, the Court granted Restitution, and set aside Judgment, being founded on a Rule given after the Verdict, the later end of the Term, at Guild-Hall before the day in Bank, though this were the last day of Term, but they gave a new Judgment, Nisi.

Welsh *and* York. *Thursday*, May 9.

(26) EX motione Butler, it was agreed, that the course of the Court lately setled, is that on the Declaration of 200 l. the Bail is liable to all Actions under the same Term, but not to Actions above that Sum.

Ipsley *and* Stroud.

(27) IN Trespass, the Defendant justifies the digging Lead, and Lead-Dar, Cum terra & lapidibus commixt̃ e puteo prædict. effossat̃, laying out the tenth to the Lord Royal in Lead, Lead-Dar, Cum terra & lapidibus commixt̃ e puteo prædict. sic effossat̃, and issue thereon, and on Evidence at Bar, the custom appear'd to be that any Miner in Mindip Hills in Somersetshire may pitch and work all over the Hills, paying the tenth in Lead or Lead-Dar purely washed by weight to the Lord Royal of the place digged, and per Curiam this is variant from the custom in Issue, though the Dar cannot be so washt but stones and earth will adhere, and a Juror was withdrawn by consent, the custom being proved.

The

The Dean *and* Chapter of Durham *verſus* Archbiſhop of *York*. Friday, *May* 10.

JOnes pray'd a Prohibition to the Archbiſhop of York, on Citation of the Dean and Chapter of Durham, to try the Right of the Guardianſhip of the Spiritualties ſede vacante of the Biſhop, ſuggeſting a cuſtom in the Dean and Chapter on Hill. 33 Eliz. Rot. 624. the like Prohibition between the ſame Parties on the ſame occaſion, and per Curiam it was granted, Niſi. (28)

Purify *verſus* Raynelds.

WAlcot pray'd a Prohibition to the Town of Shrewsbury, after Judgment on Demurrer to a Plea to the Juriſdiction ſworn in an Action upon the Caſe, there brought for the profits of the Office of the Clerk of the Signet, and the Entries of Orders in the Marches quod Curia procedere non debet, &c. which was over-ruled by Award, becauſe this appear'd by the Declaration to be out of the Juriſdiction, and there was no final Judgment, and the Court granted a Prohibition; but if there were any Judgment after this Award, the Court would only leave them to Error, and becauſe there is no Error nor Appeal, is the reaſon that Prohibition go after Sentence to the Spiritual Court. (29)

Cannon *and* Hamon *againſt* Agas.

IN Treſpaſs by the Plaintiffs as Executors, for taking of ſeveral Goods of the Teſtators. Holt excepted in arreſt of Judgment, that its not ſaid when the Goods were taken; Sed non allocatur. For they are Aſſets in whoſe right ſoever. Hales ſaid, He knew a Trover, not ſaying when converted is intended in his own time, Latch. 214. pl. but here its well enough, and Judgment for the Plaintiff. (30)

Jay *and* Bond.

IN Debt the Defendant pleaded that before the Action brought, the Plaintiff was and yet is Excommunicated, & profert Literas Patentes Epiſcopi, Sarum quæ hoc teſtantur, to which the Plaintiff demurred, being but a recital, and ſhould be poſitive that he is denounced Excommunicated, and (31)

not quod scrutatis Rotulis continetur, that the Plaintiff is certified to be Excommenge in his Predecessors time, and being but a Record, the Court inclined it was well enough. But Adjornatur. 2. It was said profert Literas Patentes Episcopi, and doth not say sub sigillo, which per Curiam is ill, though the usual course be so.

Carpenter *and* Smith.

(32) JAne Capel Tenant for life, Remander to William in fee, William levies a Fine to the use of John and his Heirs, after the death of Jane and William; but if John dieth in the life of Jane and Mary who had nothing, then to another William in fee, which per Curiam is the very Case of 2 Cr. 590. of Pell and Brown, but John hath first only a contingent Estate, and if John dieth in the life time of William the Father, then to the right Heir of the first William, and the Heirs and Assigns of such first Heir, under whom the Plaintiff claimed as a Purchasor, on 1 Co. Archers Case. But of this the Court doubted, and being but a Record, Adjornatur.

Anderf. 256. pl. 264.

Bellamy *and* Hunt. *Saturday*, May 11.

(33) MAynard excepted against a new Trial on non Assumpsit pleaded, and special a Verdict finding subsequent Agreement by writing, and broken by the Plaintiff, and if pro Plaintiff pro Plaintiff, damages 200 l. which were said to be excessive being all that was promised, and by the subsequent agreement there ought to be abatement, though Judgment was agreed must be pro Plaintiff on this Issue; and the Court agreed that a special Verdict may be as to Damages only on non Assumpsit, and Hale Chief Justice said it was so adjudged in a Case where he and Maynard were of Council, and if it appear'd by the Verdict that the Plaintiff had not performed, he should not have so much Damage, but if in substance it were performed it is sufficient, and out of the Issue; also the later agreement being offered as a discharge of the promise, and not in mitigation of the damages, the Verdict had no regard to that, and therefore the Court refused to grant any new Trial.

Williams

Williams *and* Fry.

ON a Lease of George Porter a special Verdict was found, (94)
the Earl of N. seized in fee, had Issue three Sons and two Daughters, Isabel was married to the Earl of Banbury, Anne was married to Charles Porter alias Fry the Defendant. That the Earl of N. devised to the Lady Anne Knowles, provided and on condition she marry by consent of the Trustees, and if she marry without, Remainder to Lessor of the Plaintiff; she married without consent to Fry, without notice of the Will, that Porter was then under age. Raynsford held this proviso to marry by consent is a limitation, though there be express words of condition on 1 Roll. 411. p. 5. and Owen 112. Wiseman and Baldwins Case, and 3 Co. Wellcocks Case, and 2 Cr. 56. here being a Remainder limited over to the Lessor of the Plaintiff, and here is a future Devise. 2. The infancy of the Devisee, 8 Co. 42. and Lit. Co. 234. doth not avail her, the condition being in fact, and imposed because she was an Infant. 3. No notice is necessary of the Will or Condition, but she must take notice of both at her peril; but where a Devise or Conveyance is made to the Heir at Law, he must have notice of both, else 8 Co. Francis Case, he shall lose nothing, but where the Devise or Conveyance is to a stranger, if one of the Parties be not more knowing nor privy than the other, but equally and indifferently strangers, the Devisee must take notice of the condition, which appears by 2 Cr. 145. Molineux Case, where the younger Children must give notice to the Executors, and 5 Co. Malloryes Case, Bargainee must give notice before Avowry for rent, so 3 Leond. 95. Gurneys Case, before Entry for condition, thus, 4 Co. Hollands Case, notice of resignation must be by ordinary Computation, and Dyer 354. Lit. Co. 211. the like on revocation of Uses, where time or place is incertain. So Popham 10. but as in an Action upon the Case, 22 Ed. 4. 27 & 28 Lessee for years must remove in convenient time after the death of Tenant for life at his peril, thus laps by death incurs without notice, and this is the reason of 1 Roll. 856. Gimlet and Sands, 1 Cr. 391. and 1 Roll. 469. Spring and Cæsars Case, where there was none to give notice. So 1 Cr. 575. the Mayor of London and Alport, though the Case were adjudged on non-claim, and the third Resolution in 4 Co. in Sir Andrew Corbets Case is full in this point, or stronger, for the Heir must have given notice to the Executors to discharge his Land,

and in the Verdict at the Bar its not found that Porter had notice of the Will before the condition broken, but the contrary presumption, and no Will concealed; nor its not found the Trustees had notice of the Will, and the Executors are not found, but however it would not be proper to give notice as to the Inheritance; also the Inheritance is here given from the Heir. And as to the main Objection of Pasch. 18 Jac. B. R. Saunders and Carvel, its so uncertainly reported by Palmer, that its hard to make any thing of it, and it appears the Will was conceal'd a year, and non constat whither the condition were to be perform'd in that time, and the question was rather what was notice then whither notice were necessary.

Twisden Justice for the Plaintiff, also that this proviso and upon condition contrary to 10 Co. Mary Portingtons Case shall work as a limitation, where there is an Estate limited over, and being in case of a Will where a construction shall be meant to support the Will, as 1 Roll. Saunders and Rich, Hill. 1649. Rot. 758. where S. was seized of Lands, and a portion of Tythes, and devised all his free Lands to J. S. on condition to permit his Wife to enjoy his Fee-simple Lands in H. in which he had only that portion of Tythes, and adjudged that they passed, as 1 Roll. 611. Burbridge and Knaseboroughs Case, and 1 Co. 8. Corbets Case, & loquendum ut vulgus, this is said on condition, and is in common use, therefore shall not destroy the subsequent limitations, as Poph. Martidale and Martin devise in fee, on condition to perform the Will, are expounded as a Limitation, and Owen 112. Wiseman and Baldwins Case was upon condition to pay, yet adjudged a Limitation, and on that Point reversed, and an Executory Devise is as a Remainder, or as a new Devise in a Will is, which are but pugna verborum, and 3 Cr. 383. & 1 Roll. 411. devise to the eldest Son on condition to pay the youngest 10l. adjudged a good Limitation and Executory Devise to the youngest, 1 Leon. 283. pl. 383. Imot and Sanders: All which are of greater authority than Dr. Butts Case, and 2 Cr. 590. was stronger than the Case in question. 2. Notice needs not, being not provided for by the Devisor, nor by the Law; nor is it said if she having notice of the Will marry contrary, &c. for then notice must be proved by some body. So 1 Cr. 132. Juxton and Thornhills Case, in Assumpsit to pay what B. appoints, notice is needless, and so upon Arbiterments which the party is not bound further to perform than notice is requisite, as obligaiton to pay the rent, it must be demanded, and I rely upon Spring and Cæsars Case, which was discharged in the House of Lords on petition lately, and the Land

enjoy'd

enjoy'd by non-payment without notice; and Gurneys Caſe was cited to be, the leaſe to be void by non-payment, and the ſecond leaſe to begin on forfeiture, adjudged the ſecond leſſee is bound to take notice of the time, of non-payment by the firſt, but of a private ſurrender by Wray there he muſt have notice, and 1 Cro. 575. the reaſon of diviſion was by the words, if through oblivion they aliened, &c. which was conceived implyed notice was requiſite, but elſe it was clearly agreed that notice was not neceſſary.

Hale Chief Juſtice for the Plaintiff, alſo 1. That its no queſtion, but this is a limitation, becauſe the words Condition when joyned with another clauſe are interpreted by it what the Teſtator meant and this hath received as many reſolutions as any one poynt of the Law where the Remainder is limited over, 2 Cro. 590. & Owen 112. Baldwin, & Wiſeman & Pains Caſe, & 3 Cro. Ainſworth & Pretiman: its all one as a proviſoe, if ſhe marry without licence, her Eſtate ceaſe; and there is nothing but the by-opinion in 10 Co. Mary Portingtons Caſe, that can ſtumble only young Students. 2. The Eſtate deviſed to Anne hath one limitation by Law till ſhe died without Iſſue and another limitation of fact that ſhe do not marry without licence, on determination of either of which the eſtate is preſently actually in the leſſor of the Plaintiff without entry or claim, and all one as a deviſe for life, and if ſhe marry that then it remain to Porter, this is all one with the eſtate quamdiu ſola vixerit; and if the want of notice be not a breach it can never be broken ſhe being married without licence, ſo if notice were neceſſary it would be now fruitleſs; but where the condition may be performed after notice there it hath been doubted as Althams Caſe, whither notice be neceſſary, but here the condition is diſcharged by the marriage, and no body can know the Will, but upon enquiry, and the ſame means that one hath to know, all have; therefore he that is to have advantage muſt make the beſt enquiry he can, for he that made the Will is dead, and cannot give notice therefore lying meerly in enquiry, and the Plaintiff and the Defendant equally concerned to take notice, ſhe that hath the Eſtate to know upon what terms, and he to know the ſtate of this Reverſion and neither is preferred therefore rather than this condition or limitation ſhall be perpetually diſcharged, there needs no notice, he that hath given the Eſtate having appointed no notice, the Court have no reaſon to ſupply it unleſs the Law ſtrongly preſumed it, which it doth not here becauſe no perſon is bound to give notice, not the heir becauſe diſherited, not the Executors

becauſe

because not concerned with the inheritance, not the Trustees because they have but their labour for their pains; also its equally in all to use the same means to enquire, therefore the Defendant must take the hazard of her own want of notice at her peril, for its her interest to take advantage of the Estate, and therefore she must take notice of the incidents to that Estate as 4 Co. Sir Andrew Corbets Case, and as when an Executor proves a Will it is doubtful where the rent is more than the land, whither he shall be charged in the detinet, but if under, no doubt but he is bound to take notice of all conditions, so on devise to the wife durante viduitate by the same reason, by marriage before notice she would have an absolute Estate for life; no man is presumed to be ignorant of his own interest, therefore he must take it with all its faults, also it is not impossible for the Defendant to make enquiry, therefore she shall not take advantage of her own laches, as Fries Case, a condition to pay 40 l. when he married the Obligors Kinswoman, and in debt the Defendant pleaded performance, and issue tendred that the Obligor had notice and demurrer thereto, and ruled, notice was not material, because though this was in the privity of the Obligée, yet it was also in the privity of the Obligors Kinswoman of whom he might have enquired, which is Hill. 1655. Rot. 2851. Shepheard & Fry, and Judgment for the Plaintiff. 3. The Defendants Infancy is no protection without question, the Plaintiff who is to give notice being an Infant likewise, but however this being not a condition in Law, but in fact an Infant hath no more avail than others, also she is as much concerned in this restriction of marriage being above twelve as any, thus the Statute that usuræ non currunt contra Infantem doth provide, that such marrying against consent shall forfeit the double value, this condition is laid on her with respect to her condition, that she cannot so well provide for her self, and the Testator might intend she should have no succession, if she married without licence, and Harwoods Case, the marriage of an Orphan in Kent without notice was finable, because it was his business to enquire whither she was or was not, for the authorities Saunders Case may be good Law if the condition of the Will were known whither if she refused to pay, or to pay and no time limited, and then being a Legacy there must be a demand precedent also the words might import notice necessary, but this not appearing, nothing can be made of it; and as for Hungates Case, the Son and Heir of the Lady Cæsar, who died before the day of payment, was ruled by all that the Heir was bound without

1 Roll. 469.

without notice becauſe none could give notice, and the Anceſtor had notice as the party to the Deed by which the mony was to be paid, ſo that comes not wholly to this Caſe, and Molineux Caſe quite differs from this being a deviſe to thoſe to whom the mony was to be paid, and notice to the Executor was there ruled neceſſary becauſe the mony lay in demand and was a rent or at beſt; but a Legacy alſo the younger Children were to have the rent and the Eſtate by non-payment, therefore ought to give notice, but Porter here was not concerned in the marriage, alſo there could be no default in the Executor till demand, and had Francis Caſe been to the younger Son, his diſturbance had been a breach without notice, but the Heir without a conveyance was entituled therefore muſt have notice of any clog by conveyancer, 1 Cro. 575. was a deviſe to the Executor on condition to pay yearly, and if by oblivion or other means they failed, then to London; there was a queſtion whither oblivion imported notice precedent, but it is not diſputed but that if it had been if they do not pay, there needed no notice, but a fine and a non-claim could not barre without a breach, which rather implies no notice was neceſſary, and per Curiam, Moreton for the Plaintiff alſo but ſick and abſent, Judgment was for the Plaintiff.

Thomſon *verſus* Lady Butler.

NOrth prayed a prohibition though the Defendant be the Wife and reſiduary legatée and the Ordinary commit Adminiſtration to the Daughter on 21 H. 8. c. 5. having but a bare authority, which being executed cannot be repealed having no judicial power. Jones for the Defendant, that the reſiduary Legatée is out out of the Statute, the Court directed to look into Collin's Caſe 17 Jac. againſt Button before the Delegates, and inclined ſtrongly that no prohibition ought to be and ſaid this, and the adminiſtrator during minority is out of Statute, but per Curiam a particular Legatée cannot repeal the Adminiſtration, nor a reſidary legatée againſt a particular legatée, if it appear there can be no reſiduum bonorum, but adjornatur. (35)

Hetley 107. pl. If Executor Reſiduary Legatee die before *probat* Adminiſtrator of Teſtator takes Jones 225. 2 Rolls 158. pl. 24.

Dominus Rex & Wats *againſt* Sherman.

Monday, May 13.

DAlben excepted to order to reinburſe 40. s. for the Midwife, and 4 l. for Nurſing being made not to reinburſe the Pariſh which he agreed reſonable but to reinburſe (36)

burse the Mother of the Bastard. 2. It was to pay 7 s. by the week to the Mother, as the Nurse until the child be able to gain his livelyhood by working, but per Curiam both are well enough and more certain than to Certain age, but per Twisden it ought to be so long as chargeable to the parish; but it was agreed that the charges precedent to the order of the Justices as for Nurse or Midwife paid by the friends of the party, unless the parish be chargeable therewith, is not good and the Defendant agreed to pay all and the parties Charges.

Knight & alii *versus* Peepes.

(37) 3 Cr. 136. & 188. Hetley 109. & 33. Hetley 33.

BEdingfield prayed a prohibition in suit for tythes on parol agreement to retein, having been several years paid on Small & Tanners Case; and to this the Court inclined but being an unsetled point adjornatur, but agreed that on nil debet this agreement is a good mitigation of Dammages, also if the execution of this agreement by several years payment be suggested a prohibition ought to be.

Harding and Brooks. *Tuesday*, May 14.

(38) 1 Brown. 174. pl. 581. 1 Readings 294.

IN a trespas by the Plaintiff as Commonor of Sir Robet Henly in Newland in Wootton Glanvil for common appurtenant. The Defendant justifies under Sir W. C. to inclose as Lord of the soil alledging this to be only common of vicinage which was agreed might be inclosed, The evidence for the Plaintiff was by sodering and diving into the place in question (by Sir Winston Churchil inclosed) The Defendants was by entry at a certain place and sodering in the other by leave and by the inclosure of part of Blackmoor Heath which was the grand common, that inclosed all the rest, which inclosure of part though but one acre made the prescription fail for the whole, being not excepted, and thereupon the Plaintiff was nonsuited.

Tuke *versus* Lady Southcoate. *Wednesday*, May 15.

(39) 2 Readings 497.

IN ejectment of Capite lands. 1. It was agreed that the value of the two parts is not to be estimated by the casual profits, but by the annual rents. 2. As to part the Defendant justified on a settlement for marriage, and 2000 l. portion which contra to Moor 746. pl. 1025. is a purchase, and so out of the Statute 32 H. 8. cap. 1. of devises being on

no provision for children, and it was said the Common Pleas on a former Tryal were of this opinion, but this Court inclined contra strongly, yet offered a special verdict. 3. The settlement of two acres to the uses prohited and the third acre to himself doth not hinder the devise of the third part, also the reversion of joynture may be deviled also per West. on Parkers Case cited in Lenard Loveye's Case 10 Co. 80. contra to 6 Co. Sir Ed. Cleres Case that the King shall have the third part of all where two parts is setled, and the third devised severally. Hale Chief Justice said that the Statute 34 H. 8. cap. is disabling as to conveiances but not to void them but make them lyable to warship, but its enabling as to devise which could not be at the Common Law, so not like the Cases before put which are both good Law, and where several devises be of three acres the heir shall have the third part of each, which the Court agreed but settlements are only voydable for the Kings interest and verdict for the Plaintiff on full direction, that before 12 Car. 2. cap. 24. the Will by which the Defendant claimed was void, two parts being before setled for affection. 8 Co. 173. Hitch. 31. pl. 106.

Dominns Rex & Nash.

WAlcot excepted to the Indictment for continuing a Cottage eleven months from 5 Octob. 21 Car. 1. till the taking of the Enquest, viz. for the space of eleven months, which was above twelve months, sed non allocatur, on 31 Eliz. cap. 7. & 18 Eliz. cap. but if there were fewer months it were void, but they would not quash it till pleaded, but Hale Chief Justice said, it was ill, and uncertain either way—— Adjornatur. (40)

Jefferson & Dawson & Orpwood.

IN Scire Facias on a recognisance, the one pleads that Smith was seised and conveyed to Robert and Thomas Yarway, and that Robert died and Thomas survived, and so the Statute is void, as to the survivor and doth not traverse as at first, absque hoc that Robert died seised which per Curiam is needless. The Plaintiff replied that Robert and Thomas infeoft I. S. and per Curiam Judgment for the Plaintiff, nisi, there being no color but that the part of the joyntenant after a feoffment though the other survive shall be extended on a Statute. Post. 31. pl. 60. (41) Charge Br. 39.

Daws *and* Paynter.

(42) IN debt on an Obligation, the Defendant pleads the Statute 5 & 6 Ed. 6. cap. 16. of buying and selling Offices, and that there was an agreement for a rent for the Office of Secretary of the Barbadoes, which is averred to be an Office of Justice, and to this the Plaintiff demurred; and whether this Office being in the Barbadoes, not within the Kings Dominion at the time of the Statute, were void by the Statute or not, was the question; but the Court inclined that the Plea is good, this Office being a Grant by Patent under the Great Seal of England; also were it an Office in Admiralty or Spiritual Court, it were within the Statute. But Adjornatur.

Sterling *and* Turnor.

(43) ERror of Judgment in C. B. in an Action upon the Case, for hinderance of Fees of Bridge-Masters-Office in London, to which the choice is by the Mayor and Commonalty; and in case of dispute, the Mayor to allow the Poll, and he nec debuit nec usus fuit to break up the Court without consent of the Hall; that there was a dispute between the Plaintiff and another, and he required the Poll, yet the Mayor broke up the Court, and chose Elliot; after Verdict for the Defendant, the Plaintiff below in the Action upon the Case, and Judgment, it was excepted; here was no Right, nor any Election, as Cr. Foord and Hoskins; Sed non allocatur. The Mayor having taken away the means to know the Right and Judgment affirmed. Post 32. pl. 61.

Forth *and* Ward *against* Fletcher.

(44) IN Debt the Defendant pleaded delivery of Scriptum Obligatorium prædict. into the hands of J. S. as an Escrow, that on sealing Deed by B. it should be his Deed, else but an Escrow; and that B. did not seal & hoc paratus est verificare, to which the Plaintiff demurred, especially because its not conclude to the Country, & issint nient son fait. Et per Curiam, of later time it hath been adjudged that he must conclude to the Country, & issint nient son fait & de hoc ponit, &c. and Judgment for the Plaintiff.

Thomson

Thomſon *and* Butler. Ante.

MR. Solicitor on a ſuggeſtion, there was no reſidue beſides to pay Debts and Legacies, and that Adminiſtration is executed to the Daughter prayed a Prohibition, but by Hale Chief Juſtice, Hill. 17 Jac. Hinſons Caſe, called Collins Caſe, it was reſolved by the Delegates, that Adminiſtration muſt be to the reſiduary Legatee, and the former Adminiſtration was repealed, but for the Averment that there was no reſidue. Adjornatur. For if the Libel be only for proximity to repeal, and not as reſiduary Legatee its ill, and cauſe ordered to be ſhewed againſt the Prohibition. Poſt. (45)

Brown *verſus* Shaſton *Executor.*

IN a Scire facias to avoid a former extent on a Statute by Smith, ſuppoſing it is ſatisfied by the profits to which the Defendant pleaded one Norborn was long before poſſeſſed as Executor of an Aſſignee, and the Defendants, nor any of them had nothing in the Premiſes, and Iſſue thereon, which per Curiam is proper enough, the Scire facias being to remove the ſame Norborn Aſſignee out of poſſeſſion, 15 Ed. 3. Reſponder, and 1 Cr. 214. Flore and Elgars Caſe, eſpecially the profits being not alledged to be received by the Conuſee, 15 Ed. 3. 16. before Aſſignment, but when as in this caſe all is received by the Conuſee, it muſt be againſt him; but when part is in one time and part in another, its beſt to bring it againſt both. So in a Writ of Diſceit a Feoffee or Aſſignee ſhall not be ouſted by colluſion between Conuſor and Conuſee without a Scire facias; alſo there can be no other perſon taken notice of, but he that is in poſſeſſion. Judgment for the Plaintiff. Niſi. (46) Mich. 23 Car. 2. Rol. 276.

The Lady Pritiman *and* Marſhall. Ante.

ON the report of the Secondary, that ſhe was married, and that Marſhall had notice thereof, by ſuit releaſt before the Scire facias returned, Maynard pray'd to ſet aſide Judgment on the Scire facias on two Nihils returned; and to this the Court inclined, but the cauſe being ready for Sentence in the ſpiritual Court, adjourned till ſentence for the marriage. And Twiſden ſaid, the Husband could not releaſe an Audita Qurela brought by the Wife in both their names, and ſo it was reſolved by all the Juſtices, That the Husband could not releaſe (47) In Error Br. 173.

lease Error brought by the Wife to reverse a Fine for nonage, but by Hale Chief Justice in Nortlyes case, it was held the Husband might release such Error, but in another case it was held he could not disavow Guardian allowed to the Feme to reverse a Fine for nonage.

Dominus Rex *and* Zouth.

(48) Regist. 71. b. NOrth Solicitor prayed a stay of Process and Estreats on Excommengement pro expensis litis in suit for Alimony, the Court conceived that as to the penalties by the Statute of 5 Eliz. cap. they ought to be discharged, but the Excommengement may be proceeded in as at Common Law; also the penalties cannot be discharged but by Plea, that its not within the Statute; but the Court agreed to stay Process and Estreats on all former and new Excommengement till next Term.

Newcombin *and* Kingerby.

(49) BIgland prayed a Prohibition to a Suit in the Spiritual Court, for saying of the Defendant, being a Priest, That he was a Fool, an Ass, and a Goose, which are only words of choler, as 2 Roll. Pockie faced Knave, and Jade, and Quean, and per Curiam a prohibition was granted nisi, being not relating to his Profession.

Dominus Rex *and* Thrower.

(50) COleman excepted to the Indictment of a common footway to Church, being no common Nusans more than to common Field in the Parish but being not said pro Inhabitant Parochiæ, but pro omnibus subditis Domini Regis, the Court would not quash it, without pleading, the Church being as well intendable as the terminus of the way as for its use; But by Hale Chief Justice, if it be only a way for the Parish to Church, each Inhabitant may have an Action upon the Case, but no Indictment will lie, and adjourned till Trial.

Hopkins *versus* Prior *and* Riglesworth in Error, Br. 84.

(51) ERror having been in Exchequer, of Judgment here, and the death of one of the Defendants in that Writ of Error assigned for Error, and in nullo est erratum pleaded, which is

is but as a demurrer, and the Judgment was there affirmed, because Error in fact is not triable, and so not assignable there, and so it was this Term ruled in the Case of the Duke of Richmond and Wise, but in Due and Longs Case it was resolved Error in fact was triable by Nisi prius, and lay there, but now a new Writ of Error being brought here de Recordo quod coram vobis residet, Levnis prayed Execution may stay, which the Court denied; and by Hale Chief Justice, there can be no Error here, coram vobis, the Judgment being there by affirmance, nor can Error lie here of that Judgment which is in the Exchequer-Chamber; also this would be a means to assign Error in Law or in Fact in the Exchequer-Chamber; and when Judgment is there affirmed, the party for delay will bring a new Writ of Error here quod coram vobis, and there is no proper remedy but in Parliament, and the Court refused any Supersedeas, and they said they would have this Writ of Error allowed in Court, and will be acquainted with the matter which must contain the recital of all the proceedings that have been, as its removal into the Exchequer-Chamber, and the affirmance of Judgment, &c.

Dominus Rex *and* Morley.

(52) MAry M. brought a Writ of Error, as Heir to reverse Attainder of Cutbert Morley for murder in Yorkshire, he being dead, and prayed a Scire facias to the Lords mediate and immediate of the County, where the Indictment was, the party having no Lands, as Samson and Tothills Case, but per Curiam the Scire facias ought to be brought into every County in England, but on Oath he had no Lands but in that County, the Court granted the Scire facias, in York and in Yorkshire; but she being not in person, nor by Bail, the Writ cannot be allowed. 7 H. 7. 5. b. pl. 7. Error Br. 149.

Dominus Rex *and* Davyes.

(53) POlyxphen excepted to an Indictment below at Bridge-water, for dwelling in the Country and selling Cloth in the Borough, contrary to 1 & 2 Ph. & Mar. cap. 7. being no time of Fair or Market. 2. The Defendant is a Feme Covert, and therefore her Husband should be indicted for Sale, and per Curiam on Gregories Case, by Bill, Plaint, or Information, cannot be below, as Hetley 103. pl. Faringtons Case was adjudged, but they doubted whether the party may be indicted, and so whereever the Statute prohibits under a penalty

penalty, and per Hale Chief Justice, where the Statute prohibits, and further adds a pain, the party may be indicted generally or specially, to this adjornatur; but the Court inclined this was matter of Crime, and the Feme may be indicted alone. Post.

Hetly 37.

Dutches *of* Cleaveland *and the* Bishop *of* Coventry, *and the* Lady Chester.

(54) Serjeant Says prayed a Prohibition to a Nuncupative Codicil, which revoked a former disposition by Sir H. Wood, of the Wardship of his Daughter, made by Will in writing according to the Statute, 12 Car. 2. cap. 24. and per Curiam, on reading the Codicil, it was granted, though in question of revocation of the Will that contains Land and Goods, no prohibition can be, but where the case concerns nothing disposed, but what is out of their Jurisdiction it may.

Dominus Rex *and* Dives.

(55) Twisden excepted to the pardon of Treason of coining Guinyes, that the Indictment was not recited, but per Curiam in case of Treason the pardon is good without it, but in case of murder there may be reason to recite the Indictment, yet in Lucas Case, licet Indictatus vel non hath been held good, and he was discharged paying his Fees.

Edwards *and* Webb.

(56) In debt the Defendant pleaded delivery, as Escrow & hoc paratus est verificare, the Plaintiff takes Issue it was no Escrow, & de hoc ponit se super, &c. to which the Defendant demurreth, and the the Plaintiff prayed leave to discontinue; yet after sets it aside, and proceeds to Trial without notice, and had Judgment, and on the report of the Secondary it was affirmed, and referred as to Execution for what is due.

Whaly *and* Tankerd. *Monday*, May 20.

(57) In an Ejectment a special Verdict find Menell seized, and leased for 99 years, if A. lived so long, the Remainder to three others for the life of A. and the Remainder to the Lessor of the Plaintiffs Ancestor. A. levies a Fine, and whither the Lessor of the Plaintiff in the Remainder shall have a new five years was the question. Adjornatur.

Dominus

Dominus Rex *and* Morley.

SAunders on Weſtm. 2. cap. 15. prayed that a Guardian (58)
may be aſſigned to an Infant to proſecute a Writ of Error, without appearing in perſon, becauſe ſhe may be eloined, Sed non allocatur; the Statute referring to an actual eloynment, which was not affirmed; and beſides the cuſtom of the Court was contrary, 2 Cro. 462. in which caſe its out of the Statute; but the Court allowed to aſſign Errors de bene eſſe, but they conceived it muſt be in perſon on an Utlary, and it cannot be entred as in perſon legally, unleſs it were ſo.

Brown *and* Taylor.

IN an Action upon the Caſe for Common, Peachell prayed (59)
reſtitution of Coſts, there being but 1 d. damage, and being no Certificate on the Trial, that the Title was in queſtion, Sed non allocatur; for per Curiam it hath been reſolved by the major part of the Juſtices of England, That the Statute 23 Car. 2. cap. 9. ſect. 149. extends only to Treſpaſs, and Aſſault and Battery, and not to Action upon the Caſe, or Aſſumpſits, or ſuch like; which the Court now agreed, and denied reſtitution the rather here becauſe the Title muſt be in queſtion. See Poult. Abridg. Damages 16.

Jefferſon *and* Orpwood. Ante 25. pl. 41.

IN a Scire facias on a Recognizance by Yarway, the Defen- (60)
dant pleads that one Smith was ſeized, and infeoffed Robert and Thomas Yarway, and that Robert died, and that Thomas ſurvived; the Plaintiff replieth, That after the Recognizance Robert and Thomas leaſed to the Plaintiff for a year, not ſaying, Virtute cujus poſſeſſionatus fuit, or Entravit; and that after they releaſed, which by Jones on demurrer is ill, on Litt. which the Court agreed, and it will be a great entanglement to take Judgment on the Verdict; the leaſe for years pleaded by Dawſon being Precedent, and by this plea of the whole avoided, and if on Orpwoods plea the ſubſequent Freehold appear to be againſt the Plaintiff, he will have no Title at all, and the Court inclined that this Leaſe and Releaſe is ill pleaded, and Judgment cannot be taken on the Verdict alone, the other plea being to the whole, but if theſe were pleas for ſeveral parcels, it would be well enough

Dyer 187. b. pl. 7. 7 H. 6. 33. Dower Br. 48.

enough for part. Et Adjornatur, as to the demurrer, and the party left at liberty as to the Verdict. Poſt.

Starling *verſus* Turnor, Hill. 23 & 24 Car. 2. Rot. 1125. Ante 26. pl. 43.

(61) GOodfellow excepted that the Election without a Poll is void, 1 Roll. 108. F. N. B. 47. and its incertain whither the Plaintiff ſhall have it on the Poll, but per Curiam this is in mitigation of damages only, for if 20 men ſtood each muſt have the Poll, if it be the Officers duty to give it, and an Action upon the Caſe well lieth, and Judgment was affirmed.

Dominus Rex *and the Lady* Braughton.

(62) THe Court on ſeveral Complaints of Priſoners againſt her, committed her, and ordered Information againſt her, and an Enqueſt againſt the Dean and Chapter of Weſtminſter her Leſſor, to ſeiſe the Priſon of the Gate-houſe, of which ſhe was Leſſee, Quia in all ſuch caſes reſpondeat Superior. And Hale Chief Juſtice ſaid, That the Dean and Chapter could not leaſe ſuch a Franchiſe, but only make a Deputy. Poſt.

DE

Termino Trinitatis

Anno 1672. in *B. R.* 24 *Car.* II.

Friday, *June* 7.

Hale Chief Juſtice. {*Twiſden*, *Rainsford*,} Juſtices.

. Jefferſon *and* Dawſon. Ante.

COleman prayed Judgment as to the Iſſue, which the Court refuſed, and inclined it could not be, but left the party to take it at his peril. 2. The Defendants cannot, being no entry is alledged, be in as Diſſeiſors, though the Conveyance by Releaſe be ill pleaded. 3. It was ſaid that one Joyntenant died, and not ſaid ſeiſitus, Sed non allocatur; for were he diſſeiſed, the Survivor may enter; alſo if ſeiſin be alledged, the Plaintiff by Replication muſt traverſe it afterwards. Weſton for the Plaintiff moved to quaſh the Scire facias, and Granted. (1) Joyntenants.

Minſhall *verſus* Mechin.

WInnington prayed a Prohibition to the Chamberlain of Cheſter, in Bill by ſecurity in nature of Aſſumpſit, for not repaying money, he pleaded an Obligation, ſuggeſting he had not ſuch preciſe proof as the Common Law requires, &c. to which the now Plaintiff had anſwered, and confeſt receipt of part of the money, and per Curiam a Prohibition was granted on Witherly and Wibrids Caſe, the Plaintiff below by anſwer having the effect of his Suit. (2) Prohibition.

Dominus Rex *and* Davyes. Ante.

(3) Indictment.

POlyxphen conceived no Indictment lieth on 4 & 5 Ph. & Mar. cap. 7. because particular ways are prescribed, as Castles Case, 2 Cr. 643. also did an Indictment lie, yet not below in Bridgewater. Hale Chief Justice said, he had known that on a general Prohibition and superadding a clause to sue, an Indictment lyeth, but not where a Statute saith, if such Acts be done the party shall sue, &c. Also it may well enough be low for they may enquire who lives in the Town, and he that lives not in lives out, and here both are well enough: which Rainsford agreed but Twisden contra, that though the Indictment lye yet not below. 3. The wife is indicted which per Curiam is well enough it being her offence, but in an action upon the Statute the prosecutor must sue in Westm. but the King may sue by Indictment in either. Adjournatur.

Watts *and* Grimes. *Saturday, June* 8.

(4) Slander.

HE pickt my pocket and I will justifie it, and at another time, He is a Pick-pocket, justifie by taking away mony contra voluntatem and verdict for the Plaintiff, Stroud prayed Judgment, but per Curiam the words are not actionable, and so it hath been often adjudged unless Felony be charged; Judgment for the Defendant.

Thomson *and* Butler. Ante.

(5) Administration.

JOnes opposed a Prohibition in suit by the wife Residuary Legatee to repeal Administration granted to the daughter without summoning the wife because she is not within the Statute 21 H.8.c.5. and in Buttons Case and Hinsons Case, and in Collins Case, it was ruled that Residury Legatee should be preferred before next of kin or Creditor &c. Also averment of no assets is not sufficient there being debts that may be had hereafter, and the Administration shall respect what the Estate may be, and constant practice takes no notice of assets in the Spiritual Court: The Court agreed that assets or not is not material, so there be a Residue of the Estate, but by Hale Chief Justice whether there be a Residue or not, which is pleadable in the Spiritual Court, the Residuary Legatee was to have all the surplus and residue; by the intent of 21 H.8.c.5. and no provision is to be, so its out of the Statute as the pre-

preſences of the Husband and Adminiſtrator during minority are both out of the words of the Statute, ſo of the Adminiſtrator pendente lite who have nothing to their own uſe, and the Court inclined ſtrongly againſt a Prohibiton. Et adjornatur.

Cole *and* Levingſton. Ante.

MR. Attourney Finch for the Plaintiff, the ſettlement in July 1627. by Sir Peter naming his Children and Grandchildren, and if it fortune Dame Mary Powel or ſuch and ſuch die without iſſue, to the uſe of the ſurvivor according to their ſeveral and reſpective parts, and in default of Iſſue to Peter Vanlore the younger, and he conſidered each fifth part by it ſelf, and that a fifth part is due to the Heirs at Law is not doubted, but how much more is the Queſtion; and as to the Lady Powels fifth, the proviſoe that limits the Remainder over on her death without Iſſue is void, which being gained there can be no other point in the Caſe. There are but two expoſitions that can be, one that he that dyeth his part ſhould be diſtributed among the line of the ſurvivors promiſcuouſly which is full of abſurdity and inconveniences, for this operates firſt in 1637. on the death of Henry Glenham, when there were then ſurvivors and what eſtate they ſhould have is conſiderable, but theſe came into indiviſibility, as appears alſo by the next, which is in 1638. on the death of Peter Vandebende which third of the fifth part is divided into nine parts, and the tenth of Glenhams alſo, and this alſo follows in the third line of the Lady Powels death when the fifth is divided by ſeventhſ, which in jure reprobatur, and all the fruit of the firſt limitation would be deſtroyed by the later. 2. When any one of a Tribe dyeth it ſhall ſurvive in that Tribe till that fail which is inforced by the interchanging or and and, yet the proviſoe is ſtill incertain for when any Tribe fails the quantity that ſhall remain is uncertain, whither fifths or fourths and alſo the quality whither Joyntenants or otherwiſe; alſo whether this Remainder ſhall be ſubject to any ſubdiviſion or not which will render it impoſſible to give a right Judgment on the Quota pars, therefore the clauſe that thus entangles the Court ſhall for that cauſe be rejected as 3 H. 6. 44. & 5 Co. Slingsbies Caſe & Hob. Pie & Coke. Alſo this doth not ſecure what it pretends to ſettle, for if a whole Tribe be extinct for a third part the Inheritance is determined and devolves to the Co-heirs and to the reſt of the Tribes a new Eſtate Tail ſhould ſpring out of the old (6)

Reversion, which though it may be yet it is not well secured, for a Fine by Co-heirs without notice, as Weg and Villars Case would have destroyed the contingent; and the words of going about to alien are exploded in Mildmays Case, Politia legibus not leges politicis adaptantur, these Remainders are contingent as the survivorship is, and the seisin that serves these uses remains in the right Heirs till the contingent happen; Also no part of the Lady Powels can go to such as died in her life time; also none of the survivors of any Tribe can take the share of the deceased, because they cannot take as the clause is according to their several parts. 3. Supposing the proviso be good, how shall the Lady Powels part be divided; and it shall be per stirpes because division per Capita would be infinite fractions, which Hob. 88. is to be repressed; also a distribution per Capita is contra to the intent of the settlement, which in case of the Cesars was to fail on putting the bond in suit and then is divided per stirpes; also if Co-heirs disturbe their parts are to go accordingly being in company in the other, Hob. 273. and so without saying of a Tribe it was to be thus divided; also if the Lady Powels part be divided by 5ths there will be a redundant 5th to the Co-heirs and the intent of the party is not material if not expressed, and the recital of Acts of Parliament doth often mistake the Law and the fact also 4 Inst. 304. Also 4 as to the Lady Powels Fine it hath discontinued the Remainder at least of if contingent detinue Fitzherbert 1 Co. Archers Case is utterly destroyed, and the act that disanuls that Fine it respects each Tribe as to its own 5th who were joyntenants with several Inheritances as Levingstone understood it who levyed two Fines accordant, for in Sir Richard Temple and the Lady Baltinglasses Case it was so resolved who by a Fine forfeited a moety so limited and here can be no cross Remainder among the Tribes here being three to take, as 2 Cro. 655. and though there be but two Cæsars yet by implication there can be no cross Remainder in a settelment though in a Will there may also the act for the Lady Glenhams estate being subsequent to the Lady Powels with saving strangers right leaves the case as it found it. 2. As to the other Tribes in respect to the Lady Powels part by the act, the contingent Remainders are not revived, that by the Fine were destroyed, the words of voiding referring only as to the Entry, not to void all things ab initio, in which case also there needed not a claus to nul it as to the Entry. Also had the Fine been voided by Error, the contingent had not been revived nor Forfeiture purged as was resolved in the Lady Baltinglas Case, the habebatur tale recordum

cordum is sufficient to destroy the Remainder. Also Levingston by his subsequent Fines hath destroyed all future rights, 2 Co. Bucklers Case, it being not possible to pass the right by the Fine, nor to keep it against his Fine as 9 H. 7. 25. and 2 Co. Sir Moyle Finch, Hob. Clanricards Case. 4. The Judgment to be prayed on the whole is of a fifth, and of the Lady Powels fifth in tail, the Limitation being void of her Remainder not revived by the Statute, but if revived then of a fifth redundant of a fifth, and if the proviso be good and no redundant fifth either her fifth must go to the eleven in the proviso or to the four surviving Tribes or to the several Capita and according to this Judgment of two elevenths of a fifth and three elevenths of a fifth, and eleven of a fifth, and a sixt of eleven of a fifth, but on the division per stirpes Judgment for two fourths of a fifth, and one of the fourths of a fifth or on the division per Capita, Judgment for a seventh of a fifth as to Levingston, for two seventhes of a fifth, and for two sixths of a seventh of a fifth on Pet. Glenhams death being joyntenants with several Inheritances, and two fifths of a seventh, and for two fifths of a sixth of a seventh of a fifth, also on Sackvils death two fourths of a seventh of a fifth, and two fourths of a sixth of a seventh of a fifth, and two parts of a seventh also for the other Tribes Judgment of one fifth and two thirds of a fifth on Vandebende's death.

Hale Chief Justice. I conceive the division must be per Capita for the division per stirpes will not go by a cross Remainder as intended; also though Error do not totally reverse the Fine, yet the Act of Parliament must revive all contingents or do nothing, and there the collateral warranty will be a barr and the intent of the Act was to revive all rights, and Levingston not having only a bare right which would vanish and not be revived but its an Estate clothed with a right and so is revived. Adjornatur.

Wheeler *and* Tankard. Ter. 23. Car. 2. Rot. 1513. Ante.

A Special Verdict in Ejectment find Menel tenant for 99 years determinable on a life, a Remainder in Tail, Tenant for years makes a Feoffment, and levies a Fine, he in Remainder being of full age and dieth within the five years then Cestuy que vie of the tenant for years dieth and whether the Infant heir of tenant in Tail shall have new five years was the question, and Levins for the Plaintiff, that he shall, on (7)

2 Cro.

2 Cro. Cromwel and Andrews Case, and Dyer 157. the Feoffment and Fine being but as one Conveyance being 3 Co. 79. Fermors Case to the same persons and uses 1 Cro. 156. Salmin and Clerks Case, though no Covenants be that all shall be to the same use. And 2. this admitted the Infant shall have new five years on the second saving in 4 H. 7. cap. 24. for though the Plaintiff might have entred presently on the forfeiture, yet that was a right which he was not bound to pursue, but on the death of Cestuy que vie the Estate was determined and then the Plaintiff was bound to persue which is plain in case of a bare tenant for life, Moor 71. pl. 197. & 3 Cro. 25. 4. Launds and Tucker and 3 Cro. 219. Smy and June 2 Inst. 519. but the Nota 9 Co. 105. b. Podgers Case, and Pl. Com. 347. hath made the doubt of this Case where Catlin denieth what Welsh affirmed which was as before is ruled and the Nota in 9 Co. 105. b. is not warranted by the Case, but against the Judgment of it; and were it agreed that if the Lessée be ousted and the Disseisor levy a Fine, the Lord could not have an Assize, yet on a Fine by the Lessée himself as here he might and no differences here betwéen Lessée for life, and for years. 3. Though he in reversion that make the leas be barred that hath rent and services in the mean time yet he that here hath but a dry Remainder cannot without great mischief be barred by such Fine even of Lessée himself, 3 Co. Fermors Case The Lessee for years 5 Co. 124. Saffins Case, could not levy a Fine at Common Law, and therefore is not enabled by the Statute, but partes finis nihil habuerunt may be alledged and so be in this case within the saving of the Statute, also these savings are to be interpreted to suppress mischiefs of such secret Fines and on this reason, 1 Leond. 212. an Infant not in Esse at the time may enter. So Pl. Com. 366. a. & 3 Cro. 819. and there are no words of the Statute that make differences betwéen tenant for life and for years.

Weston contra. For the Defendants Feoffée of tenant for years its plain if the time begun in the Ancestors time the Infant is bound as 1 Leonard Stowels and Zouches Case, also Fines operate stronger by way of Barr than by way of Title, also feoffment is necessary by tenant for life but not so in case of a term therefore the party must take notice of that as a wrong.

Hale Chief Justice conceived plain that on a Fine by Lessée for years, there is no effect of non-claim but on a Fine by his Feoffée, it is all one as of Disseisor so it cannot be said partes finis nihil habuerunt, which the Court agréed. 2. Where Tenant for life is ousted there is new five years not so in

case

case of the Lessée for years ousted which hath been a constant difference, but this case differs, for in this there can be no difference in reason between the Lessée for life and years, for though the Lessor may enter to avoid a warranty, yet not to avoyd a discent, nor the like in neither case; also there is a mutual privity between the Lessor and Lessée and livery may be private and by this means any Lessée or Copiholder might soon discharge himself from his Lord or Lessor, a Disseisor comes aperto Marte; contra of a Lessée who during his time hath an apparent right to which the Court inclyned. Et adjornatur.

Earl Thanet *and* Graham. *Monday*, June 10.

(8) Visne.

SCrogs prayed the Visne might continue laid in Kent, where an Action de scandalis Magnatum is laid the words relating to facts in Kent, but per Curiam no other cause being shewed, and the words being sworn to be spoken in Middlesex, the Court would not alter the common course, but ordered it at the Bar in Middlesex, notwithstanding it was said by Levins that in the Lord Stamford against Needham it was denied to alter the Visne from the place of the Action being an action upon the Statute pro Domino Rege, and afterwards at the tryal at Bar in Michaelmas Term Graham askt pardon denying the words, and so agreed.

Bolton *and* Lee.

(9) Covenant.

IN Covenant by the Master of a Ship against the Defendant bound as one of the Affraiters & eorum quemlibet: The Defendant demurred to the declaration and alledged the action ought to be against all the fraiters sed non allocatur; for unless there were three parts tripartite eorum quemlibet is good enough as well as conjunctim and divisim, but if there were three parts it were doubtful. 2. It was excepted on 2 Cr. 247. Adderton & Dunsters Case, that the sum is miscast too little, then is due for time, sed non allocatur; for whether it be too much or too little its amendable and its not like debt, which if alledged less than in truth it is not shewing the rest is satisfied, is ill and not amendable, but though the Court doubted not that in Covenant that the alledging less then due is well, yet adjornatur to see the variance, and on special Demurrer for variance per Curiam the particulars ought to be shewed wherein that party may amend.

Walton

Walton *and* Waterhouſe.

(01) Waſt. IN Covenant againſt the Defendant of a houſe burnt in the fire for not repairig it, the Defendant pleads that before the action brought, and in convenient time after the fine viz. 1 July the houſe was rebuilt not ſaid by whom, to which the Plaintiff demurred ſpecially becauſe the time is not put in certain, ſed non allocatur, the viz. the firſt of July is ſufficient as well as in the plea. 2. Becauſe it was not ſaid who repaired and per Curiam the houſe being rebuilt by the Plaintiff himſelf, and the Defendants Executors and Adminiſtrators bound to repayr it the plea is ill, and muſt ſhew who repaired it, for if the Plaintiff built it this is no excuſe, and Judgment for the Plaintiff.

Aylet & uxor *verſus* Hutchins.

(11) Nuſans. IN an action upon the caſe for Nuſans in erecting a ſhed the Defendant juſtified it by licence from the Leſſor of the Plaintiff to erect it, the Plaintiff replyeth that after the licence, and before the Execution of it by erecting the ſhed, the Leſſor made a Leaſe to the Plaintiff, to which the Defendant demurred ſuppoſing this no revocation, but per Curiam this being before execution is a revocation, but death or leaſe after execution were no revocation, and Judgment for the Plaintiff niſi.

Forteſcue *againſt* Sir Robert Holt.

(12) Adminiſtrat'. IN Scire facias againſt the Defendant as Adminiſtrator, the Defendant pleaded in abatement that before the adminiſtration committed to the Plaintiff, it was committed to J. S. Teſtamentory Guardian of the Defendant, the Plaintiff replyeth that J. S. was dead before adminiſtration to the Plaintiff, to which the Defendant demurred ſpecially becauſe there is no day of the Plaintiffs adminiſtration becauſe its ſaid after death viz. 1 March which was before, and per Curiam had the Demurrer been ſpecially it had been ill, and as no day the viz. being repugnant but it is aided now. 2. It was ſaid the firſt Adminiſtrator was alive and the Plaintiff replyeth he was dead and doth not traverſe abſque hoc that he was alive which per Curiam ought to be and is cauſe of a ſpecial demurrer, but aided by general or by iſſue that he was alive

alive, & de hoc ponit se super patriam & prædict. def. similiter. 3. This was a Plea in Barr though pleaded in abatement to gain time for the Defendant being Parliament man, which Hale Chief Justice exceedingly blamed the Councell (viz. Saunders) for it, and said no Councell ought to hinder his Client, or serve a tourn but to plead faithfully; but per Curiam though this be an ill Plea, yet there can be only a respond' ouster awarded not Judgment peremptory unless on Issue, &c. and a respond' ouster was awarded.

Procter *and* Newton.

IN an Action of Covenant to enjoy absque legali Impedimento of two, and the Bench alledged that B. habens jus præcedens to the Plaintiffs Conveyance virtute tituli did enter as the Case of Strike and Bates, Hil. 18 & 19 Car. 2. Rot. 1412. to which the Defendant demurred because here is no sufficient Title alledged, sed non allocatur on 2 Cr. Kirby & Hansacie & Hub. Mapes Case. It had been playner to have said Habens legale jus but habens jus is well enough præter Twisden, who on Yelverton 30. held it necessary to alledge the Entry per legalem titulum, which had the Covenant been against the lawful title of J. S. breach must be so but this is sufficient, lawful Impediment; and Judgment for the Plaintiff. (13) Covenant.

Dominus Rex & Davies. Ante *Tuesday*, June 11.

HAle Chief Justice said, or otherwise doth not extend to the Kings Courts at Westminster, as Gregories Case, otherwise if it had been by Bill, Plaint, &c. 2. It is said she inhabited in the County, but doth not say, she did not inhabit in the Corporation, but this being by way of proviso is Evidence only, and need not be alledged, and per Curiam the Indictment is well enough below, and so ruled in Case of a Phisitian indicted, yet agreed that an Information must be in B. R. on 14 H. 8. cap. for practising without a licence, but on reading the Statute, it appearing by the body as well as the proviso; Hale Chief Justice held this ill; and though it hath in Southwarke been disputed, whither this be so exclusive of the Justices Jurisdiction, as to make what is done in Sessions a nullity, yet this is a sufficient Exception, that it is not the said party did not inhabit in the Corporation, and the proviso is but explanatory, adding that they must also be Freemen, also to exclude (14)

others from Markets will make a great Hurrycane in the Kingdom, but the Court inclyned that one, that is not an Inhabitant in the County, cannot trade, Twisden and Rainsford doubted, and so the party was left to plead or demur.

King *and* Melling.

(15) SPecial Verdict in Ejectment find Robert who had Issue William out of the Case, Robert who had Issue but died in his Fathers time, and Bernard and John and then devised thus. I give unto Bernard whose wife is the Defendant, all my Lands for his life, and after his decease, to his Issue of the body of his second wife, as he shall marry &c. provided it may be lawful for Bernard to make a Joynture for such a second wife for her life, Barnard entred and suffered a Recovery, and then his first wife died, then he took the Defendant and covenanted to stand seised and died without Issue; John the Lessor of the Plaintiff comes in as Heir on failer of Issue.

And Coleman for the Plaintiff conceived B. had it but for life by the devise, and so his Recovery is a Forfeiture 6 Co. Wildes Case: the Heirs in this Case are purchasers, and 1 Co. Archers Case, being an express limitation, 1 Roll 837. & 1 Keeble 47. pl. 83. Blunket & Holmes was on Lewis Boles Case Co. held a divided Estate for life with a contingent Remainder. 2. By the Recovery the Contingent to Issue by the second wife is barred. 3. This Proviso makes no Joynture, but is as Digs Case, a power coupled with an Interest which depends on the Estate to which it belongs, and is destroyed by the destruction of the Estate; and were it a collateral power, yet it is not well executed the Covenant to stand seised being out of the Fee-simple, and refers not to the Will, so whither a Power or an Interest it is gone.

Levins for the Defendant. That here was no Remainder at all, but a present Estate Tail though his first Wife were then living, for a Remainder shall not be contingent but where the particuler Estate must determine before it happen, and it cannot be supposed but he must have Issue 3 Co. 19. at least in ventre sa mere, so it is no more then a devise to him and to his Issue by his second wife, which is a clear Estate Tayl, and so here, for it could not be intended as 6 Co. 16. Wildes Case, that the Issue should take presently and the express words are no more than the Law requireth also a double Contingent, as Co. Chudlies Case, and Co. Rector of Chedington

Chedingtons Case, must arise by express limitation in the Deed, for there may be twenty Contingents dehors, 1 Inst. 20. b. This is held a Joynt Estate Tail to the Husband and the Wife severally married. Pl. Com. 35.

The Court agreed these Cases, but said they were not like the Case in question, for though a devise to one that hath Children be no Estate Tail, yet if he hath none it is, 1 Co. Archers Case comes not close to this, for it hath been resolved that to the heir after the death of the party hath been adjudged an Estate Tail in the singular number, but where it is further to the Heirs of the body of such Heir it is but for life and the Heir is a purchasor. And the Court inclined strongly that being expressly for life the Remainder after his decease to the Issue of the second Feme, it is but for life; as a devise to A. and men children is Tayl, in Keil. pl. 1 Rol. Parkers Case, A devise to Male Children after his decease was held but for life, but that devise was for life only, &c. 1 Anders. 43. pl. 110. and were it devised to B. and after his death to his Issue it would be an Estate Tail, but being devised expressly for life first, it shall not be implyedly taken for a Tail; and Fursey & Quinzby. A devise to two and to their heirs equally to be divided between them, and the survivors of them adjudged, Jointenants, the Implication of tenancy in common being left at large and discharged by the words of the Survivorship and by that encounter the intention of the Will is left by the construction of the Common Law. 2. The adding of the power imports it to be but for life, for had it been an Entail he might do it without, and however the power is destroyed by the Recovery also when a man hath such an Estate as the power will be raised out of it the power must pursue it; but when that Estate is destroyed and the party hath no Estate out of which it will rise, it shall rise on a power to make Joyntures; a Covenant to stand seised was held good by tenant for life, the Remainder to the first Son, &c. for valeat ut valere potest. Et per Curiam, Judgment for the Plaintiff. Nisi.

Alſop *and* Pine.

(16) IN a Replevin the Defendant avows for rent granted for three lives, and the longer liver on power given to the Grantor to grant one or more rents not exceeding 20 li. per ann. for the lives of A. B. & C. And per Curiam for three lives and for three lives and the longer liver is all one; and on demurrer to avowry, Judgment for the Avowant.

Fitzgerrard *and* Marſhal.

(17) ERror of Judgment in B. R. in Ireland not well removed out of C. B. thither. Hale Chief Juſtice conceived that Judgment in C. B. ſhould be reverſed and the ſame Judgment here as ſhould be in B. R. in Ireland, quod breve caſſetur as not well removed, which the Court agreed; but it was rather deſired a ſpecial Rule expreſſing that the Judgment here is reverſed becauſe not well removed out of C. B. and becauſe its not well removed in B. R. there Execution may be taken in C. B. below, per Curiam it was ſo ordered.

Smith *and* Martyn.

(18) ERror of a Judgment in Ejectment of a Meſſuage in Durham was aſſigned in Judgment of Meſſuage and Garden parcel thereof, becauſe of a Garden there is a particular Writ, Sed non allocatur the garden being well demiſable as parcel, and Judgment affirmed.

Woolly *and* Woly.

(19) ERror of a Judgment in Debt on Award was aſſigned in the award being of differences, and is that the Defendant ſurrenders as Councel adviſed, which per Curiam is well enough, but being for payment of Annuities, and that not ſecured, adjornatur till that ſecured.

Opie

Opie *and* Peters. Entred Trin. 23 *Car.* 2. Rot. 319.

IN an Action upon the Case on mutual agreement to pull down an old house and build a new one, and that the Defendant pay pro labore, and averrs the Plaintiff paratus fuit & obtulit to perform all his part, after verdict for the Plaintiff. (20)

Hale Chief Justice conceived that the promise here is conditional and that the party cannot have wages till work done, paratus & obtulit implieth refusal in a Verdict. Twisden 48 Ed. 3. 2. & Co. Ugthreds Case held this mutual covenant and need no averrment of performance, and pro labore is implied and the assent pro tota transportatione in Bulstr. the like, 1 Roll. & Cole & Podage Kebel pl. Hale Chief Justice a reciprocal promise doth not take away the Condition which is here precedent but upon subsequent condition, as pro consilio is subsequent and performance is needless, Mich. 10 Car. 1. 1 Cr. 385. Vivian & Shipings Case Rayinsford agreed in omnibus with Hale Chief Justice, but the obtulit implying refusal in the verdict Judgment for the Plaintiff; and Hale Chief Justice said he never allowed a reciprocal promise, where the intent appears the work should be done before the mony paid, else a man might be forced to pay and sue a beggar.

Lord Arlington and Merrick.

IN Debt on an Obligation the Condition that one Gennings deputy Postmaster of Oxford for six months should pay all such monies as he received while he continued Postmaster; on Oyer the Defendant pleads general performance, the Plaintiff replies Gennings continued two yeras longer Postmaster not saying where, and that he the first of May in the last year received so much and paid it not over, to which the defendant demurred, and the Court inclined strongly no action lay, the six months being past, and the continuance after must be on a new agreement to which the obligation reacheth not, Judgment for the Defendant. Nisi. (21)

Baily

Baily *and* Munne, &c. *Wedneſday* June 12.
Paſch. 23 *Car.* 2. Rot. 1012.

(22) SPecial Verdict in Ejectment of the Vicarridge of Cranbrook with cure of Souls, and that A. Vicar leaſed for 99 years for 6. s. Rent; that the Patronage belonged to the Arhcbiſhop of Canterbury, and that the Dean and Chapter confirmed the Leaſe, and that after the Leſſee converted the three Meſſuages into ſeven Houſes and that this is no part of the Manſion, 13 Eliz. c. 10. & c. 20. & 14 Eliz. c. 11. 3 Car. 1. cap. and that Fleſher died 1651. and that Leaſe expired 1661. and that Cooper was after inſtituted into the ſaid Vicaridge and that afterwards he 14 Car. 2. leaſed to Goldſmith which was never confirmed, for three years and before it ended Cooper leaſt to the Defendant 11 Sept. 15 Car. 2. for 21 years to begin from Michaelmas next, and that the Archbiſhop and Dean and Chapter 15 Car. 2. confirmed the laſt Leaſe, and that Bucke after Coopers death which was 1668. was inſtituded and by his Leaſe the Plaintiff entred.

Thirſby for the Plaintiff conceived this Leaſe in futuro void by the death of Cooper on 13 Eliz. cap. 20. by non-reſidence; the end of the Statute 32 H. 8. cap. was to ſecure Fermors Leaſes but contra in 13 Eliz. that was to preſerve the revenues to the Succeſſor, non-reſidence being before prevented by 21 H. 8. cap. the miſchief before was plurality and reſignation and promotions or non-reſidence involuntarily and deaths whereby the Succeſſor was left poor, and reſignation and plurality is but half the miſchief, promotion and death being more general, alſo the words of the Statute 13 Eliz. enforce this that the Leaſe ſhall be good no longer than the Leſſor (not the Vicar, Rector or Parſon which include politique capacity) ſhould be reſident, as a grant till marriage, and while the party goeth to Rome do imply the party muſt be alive, but if the act were with condition the party ſhould be reſident death would ſave it, durante vita, viduitate &c. are only words of limitation, 3 Cro. 123. & More 270. Mot & Hales is in this point and Bramſtons Rep. and others agree with Crook herein; and to ſay the Statute inflicts penalty which cannot be laid on a dead man, Its anſwered that the penalty is not on the non-reſidence but on making ſuch Leaſe; and were it not a perſon abſent yet it follows not, but other abſence not voluntarily may determine the leaſe as on 31 Eliz. ca. 6. of Simony ſymoniace promotus is diſabled though no penalty be on him; alſo Butlers & Goodales Caſe is on 13 H. 8. cap.

cap. 18. in which Case sickness or Imprisonment saves non-residence. 2. This Lease made and executed 11 Sept. 15 Car. 2. for one and twenty years to commence from Michaelmas next 1 Inst. 45. & Co. Monjoys Case is void on 13 Eliz. cap. 10. and though 14 Eliz. cap. 11. exempts houses in Market Towns, yet there is a proviso that no Lease in reversion shall be good, and this is made in Remainder though not of a Reversion 3 Cro. 473. & 564. Hunt & Singletons Case & 2 Cro. 318. & Hob. 269. & Lin & Win in C. B. Pasch. 14 Car. 2. Rot. 408. Lease by the Abbot of Westminster of Saint Martins tenements came to the Dean of Westminster, and the Lessee made an under Lease for all but ten days, and the under-lessee granted and rendred his Lease and took a new Lease for forty years, and adjudged that against the successor Dean, this was void there being ten years or days mean, and Popham 8. Thomson and Traford was denyed for Law, and on sight and search of the Rolls no Judgment could be found, also Coopers Lease for three years was in being when the lease to the Defendant was made, so it was both future interest and a future commencement. 3. The rent is not yearly, but at the four Feast days, or at one and twenty days after each Quarter, so no good reservation; for if the Lessor die before the one and twentieth day, the rent goeth to the Heir, and if land be granted before it goeth to the grantee 10 Co. 127 & 2 Cr. 129. & 1 Inst. 202. Dyer 142. Moor 726. Trouts Case, & 5 Jac. Barwick & Fosters Case, 2 Cro. 227. & 233. the reason why the Rent is said due on the Feast day, was because the leafe then ended Yelverton 160. which doth not conclude the case at barr for the mesne years would be still as ill, and 2 Bulstr. 1. it appears the case was amicably agreed; also Pilkington & Daltons Case cited in Clums Case the Executor of the Prebend was defeated of such rent, this is also a rent reserved pro rata, contra to Mountjoyes Case.

Turnor for the Defendant. That the Leafe to the Defendant is good and not avoyded by the Vicars death, which is no non-residence within the Statute, which is plain on the Act which provides against the offence of non-residence and punisheth it, also this non-residence may be discontinued and continued 1 Bulstr. 111. which cannot be after death which had been easier so expressed, also sickness 6 Co. 2. Bulstr. 18. is a good excuse of non-residence, and imprisonment also doth excuse, and Hill. 38 Eliz. Robins & Prince, Moor 434, & 448. & Goldsb. 163. Co. Entr. 203. the party inhibited his benefice is also excused, the Statute 13 Eliz. intending only a voluntary

voluntary ablence not a compulsary absence, and 3 Ct. 123. is answered by being before the case of Robins, and Dilapidations are covenanted against by the lease to the Defendant and there is a greater rent reserved for hospitality. 2. That the later lease to the Defendant is good, and not to be avoided because made while another lease exisied appears by the Vicars, ownership at common Law of the whole inheritance, which was restrained as to alienation for benefit of successor, and that this Lease is rather a benefit than a prejudice, the successor having as Moor 108. and 1 Anders. Fox & Collier two several rents, and 14 Eliz. cap. 11. makes good Leases in Market Towns under forty years; also on 18 Eliz. cap. 11. this being with in three years of Expiration of former Lease: It is said also Wardens and Fellows of Colleges are as Parsons and Vicars, and 1 Leond. 306. pl. their Lease in futuro is void as a lease for twenty years after Michaelmas next 1 Leond. 147. within 32 H. 8. cap. which is as strict in this as any also before 18 Eliz. cap. 11. no doubt but Vicars might lease in futuro on 14 Eliz. and Popham 8. is express in both the former points. Hale Chief Justice said, a Lease habendum from a future day for the whole term is agreed to be void, as for one and twenty years, &c. but the matter is if from the making to the ending there be not compleat one and twenty years, this is a Quære, Dyer 142. and the Lease hath been held good, which if it be, this being a lease in Corporation and being under forty years it will be well enough. 2. As to the lease in reversion 13 Eliz. cap. 10. is general yet there was an opinion that a Vicar might make a concurrent lease as well as a Bishop which is recited in 18 Eliz. cap. 11. and is provided against, and only makes it appear 13 Eliz. did not provide against concurrent leases; but still leases in Corporation on 14 Eliz. stand on their own bottom, but may be concurrent, but the greatest question is on the exemption which is sub modo, that leases of such Houses be not made in reversion, also Lin and Wins Case which was one Brampstons Case an Attorney, if it were as a surrender it were ill there being an intervenient term, but being words of Grant the lessees interest is transferred to the Inheritance and there is only a casma for ten days between; so this comes not fully to the case in question, but Adjournatur.

Moer

Moor *and* Price. *Friday*, June 14.

ON Iſſue out of Chancery Will or not, and admitting it were, if it carried the land: As to the later the Deviſe was to Price of all my Eſtate paying 400. li. a piece to my Siſters, this per Curiam is a fee ſimple, and it appearing the perſonal Eſtate is not ſufficient to ſatisfie the Legacies, therefore this muſt be intended his real Eſtate, as Stiles Kirman & Johnſon, where it was reſolved this was no Averment de hors the Will, but conſiſtent and explanatory of it; alſo the Deviſee is not Executor, and therefore it cannot be intended the perſonal Eſtate, my Eſtate being more intendible of the Land then of Goods, and John Upridges by Deviſe that I make J. Bridges my Heir and Executor enjoies 800 l. per ann. at this day, and the Plaintiff was non-ſuited. (23) Deviſe.

Dominus Rex *and* Brown, &c. *Saturday*, June 15. and *Monday*, June 17.

WInnington excepted to an Indictment of the Overſeers of the poor taken before the Juſtices of the Burrough of Reading for not gathering ſeveral ſums of mony tart on ſeveral Inhabitants therein being certain, ſed non allocatur, but the parties ordered to plead, having notice of the perſons tart. (24) Poor.

Thomas *and* Norton.

AN Action upon the Caſe, whereas the Plaintiff took an obligation of one Hamſon in the name of one Shatterton who died, and his Executor made a letter of Attourney to the Plaintiff to ſue, diſcharge, receive, &c. and the Defendant in conſideration the Plaintiff would forbear the Defendant promiſed to pay to which the Defendant demurred, becauſe it appears not that the obligor was diſcharged ſed non allocatur, the obligation being in truſt and for the uſe of the Plaintiff. Judgment for the Plaintiff. (25)

Boulton *and* Lee. Ante.

(26) Varians. IN Covenant to pay frayght 48. li. per menſem twelve months certain and half to be paid on arrival at outward port the next at London, the ſhip was ſo many months out that the mony amounted to ſo much which is too little in one breach and too much in another but the ſumme total is right to which the Defendant demurred for variance, and Jones for the Plaintiff upon 2 Cro. 529. pl. 9. in Information and Mich. 1652. Wats & Louth, Stiles 24 pl. 727. Action on three promiſes amounting to ſo much which was more, but verdict being leſſe it was held good, and 2 Cr. 247. Addertons Caſe, was on the ſuddain and contra to Hob. 88. pl. 115. & 118. this being a nice matter and this is before a writ of enquiry and the Jury may yet find ſo as to make all right.

Levins for the Defendant as before; but on Riſly & Halſe, Latch 175. pl. 179. Noy 88. & Popham 209. & Spore 2 Cro. 569. & 1 Bulſt. 171. pl. 160. Armitage & Pemberton & Skelton 2 Cro. 498. which per Hale Chief Juſtice are in the point Yelverton 5. Hetly 121. in debt demand of the leſſee is ill, but 1 Cr. 331. where the demand is an uncertain demand of the leſſe is aided, for the demand is not of the thing it ſelf and Barber & Pomroy, Stiles 165. pl. 404. det for more than is due, and verdict for all releaſt for what was not due, and held good, and Wats & Louths Caſe Stiles 341. was in an action upon the caſe, and was held good; and the caſe is eaſier on the demand of the leſs then of more which on demurrer is doubtful, and Judgment for the Plaintiff.

Wimondſel *and* Caſtle.

(27) Joynd'. IN Scire facias againſt a ſurviving conuſor and tertenants of the other, Symſon on demurrer excepted that they could not be joyned, ſed non allocatur, for not joyning would be Error, and 1 Cro. 312. Eyres & Tanton, Scire facias againſt Tertenants includes the Heir, unleſs it be ſpecially pleaded that the Heir had nothing, and Judgment for the Plaintiff.

Mechin

Mechin *and* Minshal. *Teusday*, June 18.
75. pl. 2. supra.

(28.) BIgland opposed a Prohibition to the Chancery of Chester in Bill by one Joynt-obligor against the other to discover whither the Defendant did not receive all the mony and promise to deliver it to the Plaintiff below which being a plain Action upon the case, and denyed by answer both the receipt and promise, and therefore a Prohibition was granted, the suggestion of the Bill being want of witnesses.

Adams *and* ....

(29.) OFfly prayed an Habeas Corpus for a prisoner in the Marshalsea to testify in a cause in Middlesex, which the Court granted, but Hale Chief Justice said he never would grant it in his Chamber being but as a private person and the party may escape which would be remideless.

Dominus Rex *and* Ring.

(30.) ERror of Indictment of Forgery of a deed not saying livery and seisin or Enrolment was, sed non allocatur; for were the deed a die datus or a void deed its sufficient forgery. 2. It is a Bargain and Sale of two, and the sale only of one put to it, sed non allocatur; the Bill is found, and that he put one is no denial he did not put the other. 3. The Judgment is on the first clause of 5 Eliz. cap. 14. & Rast. 360. its not avered the Freehold is disturbed, sed non allocatur, this shall be intended unless the contrary be shewed, the Statute being only to the intent to disturb &c. whether it be disturbed or not. 4. The conclusion is, it was published as a deed of both ad grave damnum of both, sed non allocatur, for on this suit the 20 li. is not to be recovered so not material. 5. The Forgery was of a Deed p qd' he conveyed, and not as presidents are in quo continetur, that he did convey, sed non allocatur, this being but a recital as a letter of Attorney reciting that the party had demised which was no Estopel to say the Deed was not delivered it is well enough, and Judgment pro Rege Affirmed.

King *and* Melling. Hill. 22, & 23. Car. II. Rot. 359. Ante.

(31) Remainder.

IN Ejectment, Special Verdict find Melling seised in Fee and Devised to Bernard for life, and after his decease to the Issue of his Body begotten, of any second Wife; the remainder to John Melling, with power to B. M. to make Joynture. B. M. suffers a Recovery, then his first Wife dieth, then he by Covenant to stand seised settles a Joynture; and Saunders for the Plaintif, that B. M. hath an Estate for life, and the remainder Contingent, for the word Issue imports no Inheritance in a Deed, Co. Lit. 21. but only in a Will, in which case sometimes they take as joynt purchasers, sometimes as here by a joynt Contingent remainder, but if the party have no Issue at the time, rather then be void, it shall be an Entail; and if the Devisor intends Issue to take as a Purchasor, the words are plain and without violence to the Will. 2. Anders. 134. Devise to the Feme the remainder Exitui suo she then having a son and a daughter is adjudged a void remainder, and no Estate Tail, and if in the Case at Bar the words may all stand, 1 Roll. 837. its best so; to sons of his body, is held but for life in the Devisee, and 3 Cr. 313. Clerke and Day, Devise to feme and to the heirs of her body, if she have heir, is held no Entail though the remainder were over on dying without Issue; and Hub. 65. and 2 Cr. 199. Devise that if he hath no Issue, or the Issue dye before twenty one, that he may sell to the best advantage, adjudged neither Tail nor Fee, but for life, with power to sell: and 3 Cr. 248. Atkins Case, devise to S. and heirs males, and after his decease to A. the eldest son and his heirs males; ruled the first devisee had tail not abridged by the subsequent Implication, and the words being plain there is no room for Intent; and Hill. 1658. Rot. 521. B. R. Blunket and Holmes 1 Keble 47. pl. 83. it was ruled devisee had it but for life, and Leonard shall take immediately after. Also as an estate for life with contingent remainder all the Will is satisfied, but by making it an Intail the Will is violate. 2. The power to make a Joynture sheweth he had but an estate for life, for that tenent in Tail may do it without; and this power is not well executed, because where the interest is destroyed the power ceaseth; as Moor 835. pl. and Co. Digs Case, as if Tenant for life makes a lease for 3 lives, it ariseth out of his Estate for his life, and is subject to his charges, therefore when that Estate

is

is destroyed it cannot be set up again; also by the recovery a fee is gained and the joynture is made out of this though defesible, and no reference or intention of a power, and it cannot be out of both fee and power, either being sufficient to support the Estate granted.

Levins for the Defendant, Contra to 6 Co. 18. Wilds Case which is grounded on 4 Eliz. Bendlos 30. which is devise for life and after his death to his Men children, which is adjudged an estate Tail: Anders. 43. pl. 100. the same and Moor pl. 519. agrees with them, and 1 Roll. 837. is on the sons alienig, which sheweth the father had no such power; and 1 Co. Archers Case is to the right and next and first heir male, and remainder to the heirs of such heir, which sheweth it but for life in the first devisee, 3 Cr. 313. in Owen 148. is divided, and 1 Roll. 839. saith it was Tail, and the word Issue is as good as the word heir, neither of which carry an Inheritance in a Deed but by intention of a Will; and 2 Roll. 258. (H.) if A. devise for life and after his decease to the heir of his body, is adjudged Tail. Stiles 249. pl. 270. Bansey and Lowdale. 2. Admitting it was but for life yet the power to make joynture may be executed, and Co. Albanies Case refers to powers that touch the estate, and ariseth partly out of the estate, and is for his benefit that executes it, but when the power is collateral, 15 H. 7. 1. and for the benefit of a third person its not forfeit by destroying the Estate, and this joynture is of the later sort, and though this Covenant gives a Fee, viz. more then power was, it's good for so much, 1 Inst. 258. and in Chancery lately, a leas for 21 years on power to leas for ten, and was held good for ten.

Twisden Justice said Wilds Case 6 Co. was never denied and therefore the Defendant goeth up the hill, and in Lockiers Case, a devise to a man and his heir hath been adjudged a Fee simple, and there is no difference between this and devise for life Imperpetuum, which is but for life, and this admitted the power fails. On Mich. 15. Car. II. Edwards and Slater tenant for life with power to make lease to the King after his death is not gone by bargain and sail, but agreed that were the power to make a present lease it were destroyed by bargain and sail, which Raynsford Justice agreed, and said he knew this Case to be adjudged in the Exchequer. Hale Chief Justice said there had been variety of opinions, and Blunket and Holmes was nothing to this purpose, and as to the power its extinct by feoffment or fine but not by bargain and sail, which medles with nothing that is Executory, during the life of the party, but a Common Recovery, though with single voucher

or

or leaſe and releaſe doth deſtroy it, but if the power were in being this Covenant were a good Execution of the power, and Portridge's Caſe is, deviſe for life and not otherwiſe, and after his death to his male children which was but for life, but if it were to a man, and after his death to his Iſſue, it's Tail; but in the Caſe in queſtion its but for life, as deviſe for life paying 20 l. is but for life. Sed adjornatur, 224 pl. 42.

Smyth *and* Smyth.

(32.) In Trover by the Plaintif as Executor, the Defendant by Special verdit is found to be Adminiſtrator pendente lite betwæn Plaintif and another, pretending to be Executor, &c. the Court conceived that the Defendant as ſuch had no title to the Goods, Mich. 44 Eliz. C. B. Robinſons Caſe fo. 32 b. was ſo adjudged, but in Caſe the ſuit be dependant betwæn Adminiſtrators ſuch Adminiſtrator pendente lite may ſue for Goods, but adjudged for the Plaintif.

Reves *and* Holgate.

(33.) Special Verdit in an action upon the Caſe for words of a Maſter, That he is a cheating Knave, and cheats all thoſe that Deal with him in Trading, without Colloquium, adjudged Actionable.

Dominus Rex, Eveſque Worceſter *and* White.

(34.) HALE Chief Juſtice agreed that in an Information or Office pro Rege, or on a Petition of Right by the party, the King may travers, 24 Edw. 3. 30. and 8 H. 8. Kell pl. and waive it, but where the King entitles himſelf not upon matter of Record, but as to an Advowſon in Groſs he cannot traverſe, alſo in this Quar Imped', the Defendant againſt the King cannot have a Writ to the Biſhop, the King making no title, but pleading only as in poſſeſſion. Jones for the Plaintif Rege in Quer' Imped' of Advowſon as in Groſs the Defendant pleads ſeiſin of Advowſon by anceſtre as apendant abſque hoc, that the King was ſeiſed in groſs, which is ill here being a preſentment on it, but this being by laps is confeſt and avoided, ſo the travers; per Curiam is well enough, the ſeiſin in Fæ on travers may be maintained by uſurpation, 15 Car. 1. Darbie Caſe, but if the King were ſeiſed in Fæ, he could not preſent by laps on himſelf, therefore the ſeiſin in Fæ muſt be traverſt. Adjornatur.

Read

Read *and* Bovey. Hill. 23 & 24 Car. II.
1 Rot. 72.

ACtion ſur Caſe for voluntary eſcape, the Defendant (35)
ſaith, he eſcaped in November by negligence and tra- Eſcape.
verſed not voluntarily, and that he freſhly purſued and took him, and that Poſtea, viz. 29. Aug. he died, to which the Plaintiff demurred being before the eſcape, and eſpecially for the void traverſe, but p Curiam, the alleadging the voluntary is Immaterial, and the Sheriff chargeable without it; and though 2 Cro. 657. Whiting and Sir G. Reynals be ſo, yet Latch. 20 pl. is that, its well enough, and ſo Sir G. Reynals Caſe, Co. is that he need not traverſe the voluntary eſcape, but Judgment for Plaintiff niſi not being ante exhib' Billæ he died, &c.

Thomſon *and* Butler. *Wedneſday* June 19.

PLaintiff the daughter of Sir Arther Aſton, whoſe Will (36)
was proved only by White, after which the daughter Adminiſtra-
gets Adminiſtration without calling the Defendant, the widow, tion.
who was reſiduary Legatee who repeals this, and from thence the Plaintiff appeals, and on rule to hear Civilians. Dr. Walker ſaid, that adminiſtration ſhould be to wife, being granted to husband and wife is void, and hath been often repealed, and the Plaintiff hath but a 100 l. Legacy, which were it a 1000 l. its ſetled without controverſie and always obſerved without any Prohibition, Dyer Iſted and Stanlies Caſe, that the adminiſtration ought to be to the reſiduary Legatee, and in Button and Hinſons Caſe, by Haughton, Winch and Bromly, and Dr. Bird, Huſſey and Talbot, where adminiſtration was firſt granted againſt the reſiduary Legatee unheard, this was repealed and upon an appeal it was taken notice of that at the revocation the debts and legacies were unpaid yet the Judges held it well repealed, and Winch affirmed that in C. B. lately before it had been ſo adjudged, if an Executor medles the Reſiduary Legatee ſhall take it from him, but elſe a univerſal Legatee comes in in loco Executoris, ſo let the Caſe be what it will, he ſhall ouſt Wife, Kindred, Creditors and all. 2. It hath been adjudged in Chancery for avoiding circuity of Action, that the reſiduary Legatee ſhall have adminiſtration, for a particular Legatee hath nothing to do but to get that ſum deviſed, and as one

ſo

so every particular Legatée would come in, which would be Infinite and the Law prefers not one before another; and Dr. Bird said, he had known a residuary Legatée to have it for thirty years, and want of assets may be alledged in any Case never so false, and till this Issue tried the administration must stay, and the Estate in the mean time is often lost, on which reason 12 Co. Fullers Case doth deny Prohibitions, and 1 Cr. Sir Upwell Caroons Case, the Common Law Courts medle not with granting administration, and the Law works on common presumptions, as that they who devise have sufficient, though the fact be often otherwise, the Court nothing doubted the original Jurisdiction of Ecclesiastical Courts, but on 21 H. 8. cap. this Court adjudgeth who are next of kin, and whither the residuary Legatée be within the Statute or not, in which they take the advice of the Civilians, but not their direction; and the reason of the doubt was, that the Law prefers such person to the residue whom the Testator might be presumed to prefer in his Will, and this was the reason of prohibiting distribution notwithstanding what was suggested to the contrary by the Civilians, in their late Bill in Parlament: and the Case in question is on supposition that there was no residuum. Dr. Walker said, that for one hundred and twenty years the practise hath been to grant administrations to the residuary Legatée, who is loco heredis, and so in a late Case betwæn the Countess of Lincoln, against the Earl and Lady Vere Booth, minors on a Commission of Delegates at Serjants Inn, administration adjudged to the Widow was repealed by the minors who were residuary Legatories, who loco hæredis do oust all other persons, therefore this is out of 21 H. 8. cap. 8. the inconveniencies of avoiding many Judgments and Sentences had by the former administration would be as well as if any stranger took administration, which notwithstanding shall be repealed by the next of kin. He and the Court also agreed that the Plaintiff as particular Legatée may retain against the residuary Legatée, though it be repealed on a Citation, though legatum quantitatis cannot retain against legatum speciei, and any due payment shall be retained on such repeal on Citation; but an appeal doth avoid all ab initio. Twisden Justice asks, whither the Spiritual Court receives plea of no assets or not, he said they did, but never had determined it; but Spiritual Court takes security of residuary Legatée and suffers the other side to examine it.

Dr. Masters, Contra for Plaintiff, that this was hereditas jacens, and the Plaintiff entitled as Daughter, Creditor and

b.

and Legatée, and the Ordinary hath executed his power on Citing the surviving Executor, though the Spiritual Court do still repeal administrations granted to remoter on suit of nearer of kin; also the Executor refusing, the Daughter is loco hæredis; and its more reasonable the residuary Legatée receive it from the hands of the Legatée certain, and especially want of assets being here averred, which makes it a question never yet determined in the Spiritual Court, and circuity of Action could not be avoided by the residuary Legatée taking the Administration out of the particular Legatée, who is prior tempore to be paid, and so potior Jure, 26 May 1669. the Countess of Lincolns Case was only as relict not as residuary Legatée, or on want of assets; and the Lady Buttons Case is encountered. Blunt against Taylor in a Will of Hall whose wife was residuary Legatée, 10 Decemb. 1668. administrator of Blunt her husband de bonis non of Hall was repealed, and on appeal this was adjudged well. Repeal for the next of Kin against the residuary Legatée, Taylor the minor having the second administration who was Grandchild of Hall. Dr. Walker said, this was for male administration, but per Curiam administration cannot be taken from next of kin for male administration because they may take security; also the Court inclined that this is a Case out of the Statute, and that administration is ill committed to the Daughter, but the Will being in Character, to avoid sequestration, and the key left with the Daughter, it was agreed that the administration continue with the Daughter, and she to discover the key of debts and give security not to pay nor compound without mutual consent, & interim Curia advisare vult.

Harvey *and* Loe.

(37) Franchise.

IN Trover before the Mayor of Chester City, which is a County, & nil capiat per Billam, on not guilty for the Ship, the Verdit finding others tenants in Common of part. Error whereof was brought before Sir Job Charleton and Miller Justices in the County at large, who reverse that Judgment, and order Venire facias de novo of the County at large and Verdit and Judgment thereon with the increase of costs, which Winnington assigned for Error here; Walcot Contra that its suggested that Citizens of Chester by Charter cannot come out, Ideo Venire facias is dehors as 1 Cr. 445. Griffith and Lewis, sed non allocatur, for London hath this privilege, yet trials are there by nisi prius, but if it had been

suggest that Breve Domini Regis runs not there, it may be so tryed dehors; but as this Case is on reversal before Justices in County it should be sent by Mittimus to the City to try it again, but on a total reversal the Justices of the County grant restitution as its done in B. R. but the Court doubted what Judgment to give here on the reversal, because here can be no award of the Damages to the Plaintiff in the first action; but if the Judgment before Justices were quod breve Cassetur, Judgment may be here to proceed as in Error of Judgment in C. B. quod breve Cassetur, in which case this Court gives Judgment to proceed as in Formedon, and though this verdict were a kind of abatement yet the Judgment is as on Bar' nil capiat per Billam, which Williams Recorder of Chester said, he gave on the impossibility that Defendant can convert a third part of the Ship which is so found, but said not guilty as to the rest, so the Justices in the Country should have reverst the whole Judgment. Sed Adjornatur.

Eveſq; London.

(38.) Wages. HOlloway excepted to an Indictment of repairing a Way ratione tenuræ suæ, not said Jure Episcopatus, or in natural capacity, which per Curiam is uncertain, and the way being amended at Kensington they set 3 s. 4 d. fine only, and said it cannot be known against what Capacity to award Process.

Belniff *and* Pople *and* Uxor.

(39.) Slander. GO tell your Mistris Whore, &c. said to the maid Servant, Bigland prayed a Prohibition, sed non allocatur, since the time that adultery and fornication were punishable temporally there hath bin no Prohibition, &c. Prohibition was denyed per Curiam.

Lord

Lord Arlington *and* Merricke. Ante.

OFfley conceive the recital not being in the condition is immaterial, and if it were 9 H. 6. 9. & 1 Roll. 870. the recital of a condition hurts not; Hub. 130. but its now barely conditional to perform all Articles during his continuance Deputy Poſtmaſter and moſt deputations are throughout England but for ſix months, and parties are after continued on the bond and removable at pleaſure, but per Curiam, its apparent the deputation was but for ſix months, and ſecurity bound no longer; and had it been during the continuance of the ſaid deputation it had been out, and here its all one; and Judgment for the Defendant, as Staughton and Day. (40) Condition.

Foſſet *and* Breer. *Friday*, June 21. Paſch. 24. *Car.* II. Rot. 541.

ERror of Judgment in C. B. by Default, Action upon the Caſe for retaining a ſervant when ſhe was hired and not redelivering her licet ſepius requiſitus, was aſſigned becauſe the action lyeth not the ſervant having voluntarily departed abſq; licentia of the Plaintiff, ſed non allocatur, for very retainer of another mans ſervant in another County ſciens is Actionable: Judgment affirmed without a ſpecial requeſt. (41) Apprentice.

Owen *and* Lewis. Paſch. 24 *Car.* II. Rot. 540.

TRover and Action upon the Caſe againſt the Defendant, as a Common Carryer to Cheſter, the Defendant pleaded deins age, to which the Plaintiff demurred & per Curiam, an Infant is chargeable for a tort. And 2. it was excepted that an Action upon the Caſe and Trover cannot be joyned, ſed non allocatur, for not guilty anſwers both, and its not like an Aſſumpſit and Trover which cannot be joyned. But 3. its only ſaid the Defendant was an Infant at the time of the converſion, which being pleaded in Barre to the whole, prevents any diſcontinuance; but is not good after the Trover, and therefore Judgment for the Plaintiff, as to the Action upon the Caſe only. (42) Trover.

Betent *and* Frim.

(43) Condition. DEBT on Obligation Conditioned to perform Covenants, and to pay rent, &c. Defendant on Oyer pleads performance, to which the Plaintiff demurs as being no special answer to the rent, which per Curiam is ill: And Judgment for the Plaintiff.

Pitman *and* Jockeman. Pasch. 23 *Car.* II. Rot. 674.

(44) Bail. ERror of Judgment against Bail in Scire facias on Judgment against Principals in Action upon the Case. Holt assigned, that the Judgment against Bail is quod recuperet debitum suum prædict' which should be quod habeat executionem & per Curiam its ill, but declaration may be upon a Bail specialy, &c. the Defendant being amerced per Curiam, that cannot be in Scire facias, but the Record was not removed.

Jay *and* Bond. Hill. 23 & 24 *Car.* II. Rot. 777.

(45) Excommengement. IN Tresspass the Defendant pleads Excommengement in time of the predecessor, that Eveſque Salisberii per literas patentes, not said sub sigillo, but saith profert literas patentes quod hic testantur quod scrutatis rotulis of the predecessor, it appears by the Records that the Paintiff is Excommunicate in Suit for Tithes, to which the Plaintiff demurred, being not under Seal, and but by way of recital, and in the third person, & in cujus rei testimonium sigillum nostrum apposuimus, in the first person, sed non allocatur: for all certificates are thus, and not like Stone and Umam per literas patentes, not said sub magno sigillo is ill, because the King hath several Seals taken notice of, but the Bishop hath but one, and therefore per literas patentes is sufficient, and the in cujus rei testimonium is but surplusage. Sed adjornatur.

63 pl. 53.

Clerke

Clerke *and* Hall.

ERror of Judgment in White-Chappel in an Action upon the Case, one selling a parcel of Alder, Infra jurisd' promising it should arise as good at bottom as at the top, and that the Alder was removed to a part adjacent, not said Infra Jurisd' but after at White-Chappel the day and place aforesaid the Defendant promised, which the Court conceived ill. Sed adjornatur. (46) Jurisdiction.

Peale *and* Bridges. Hill. 23 & 24 *Car.* II. Rot. 1182.

TResp̃as in Haywoods close and throwing down fences, the Defendant pleads not Guilty to all but the fences, and as to those that the Defendant was possest of certain corn growing there, not saying by what title, and being incloſed the Defendant broke down the fences and entred to come to it, to which the Plaintiff demurred, specially because the Corn growing differs not from the Land, for if A. sow the Land of B. its the Corn and Close of A. till B. reenter, & per Curiam, title must be shewed, for it might be the lessees Corn growing, and he might determine the Will or the party may have the Corn by grant of Executors of a lessee or other person, but all these must be pleaded specially and Judgment for the Plaintiff nisi, so if a Sheriff sell Corn in Execution for another, till the contrary appear its his Corn that hath the Close. (47) Tresp̃as.

Stow *and* Wilmot. Pasch. 24 *Car.* II. Rot. 317.

QUantum meruit, for dyet by administrator, the Defendant pleaded he had no notice of what the Plaintiff had provided in boarding which per Curiam is ill, and the Plaintiff demurs; and Saunders excepted that there is no Visne for providing the goods, nor no profert in Curiam, which per Curiam are both aid by demurrer, the Defendant having waived both by his plea of want of notice, and Judgment for the Plaintiff & per Curiam, its but form and so hath been often adjudged. (48) Administrator.

Blackmore

Blackmore *againſt* Mercer, Graves *and* Tilſey *Executors of* M. Paſch. 24 *Car.* II. Rot. 512.

(49) Executors.

IN Scire facias on a Judgment with an enquiry, and an Elongavit & in uſum proprium diſpoſuit, to which the Defendant comes in and ſaith, that he did not Eloyn ſell or diſpoſe, &c. & hoc paratus eſt verificare, to which the Plaintiff demurred, becauſe no waſting is, as Merchant and Driver, ſed non allocatur, for the word devaſtavit is ſufficiently ſupplied; now ſince the party hath an anſwer to the Sheriffs Return, and the Enquiſition anſwers the Writ and its evidence, whither this Eloinment be a devaſtavit or not, and Judgment for the Plaintiff.

Hodſon *and* Clay.

(50) Aſſumpſit.

IN an Aſſumpſit on agreement to deliver eighty Quarters of Malt which amounted to ſo much, and 50l. was to be paid in fourteen days of the bargain, and the reſt after the delivery of the Malt. Stroud excepted in Error, that the 50l. was not ordered to be paid ſed non allocatur, this being a mutual promiſe clearly. Judgment affirmed.

Fleming *and* Fage.

(51) Aſſumpſit.

QUantum meruit for Apothecaries Ware, it was aſſigned for Error, that the Defendant pleads non aſſumpſit & de hoc ponit ſe ſuper, &c. the Plaintiff imparls and the next Court replieth aſſumpſit, & hoc petit quod inquiratur, &c. which is no Iſſue, ſed per Curiam, here is an affirmative and negative, and ſo well enough, and amounts to ſimiliter. 2. The Venire facias was præceptum fuit ad tunc ibidem, which is ill, and not ſaid per Curiam which is alſo ill. And Judgment reverſed.

Cham *and* Taylor.

(52) Uſury.

ERror of Judgment on ſingle Bill, the Defendant pleads uſurious agreement that the Plaintiff lend the Defendant 10l. and if the Ship return to pay 3l. to which the Plaintiff demurred, & per Curiam, this is good and bare Bottomrie.

Jay *and* Bond. *Saturday* June 22. Ante.

THE Court held the plea of Excommengement per literas patentes good enough without hæc verba, and by way of recital is also good, being of the predecessors time. And per Curiam, Judgment quod breve cassetur, also the not saying sub sigillo, and being in the third person is well enough. (53.) Excommengement.

Bullington *and* Salter *Executors of* -----

IN det against Executors he pleads in abatement, that there was an other Executor not named who did administer, the Plaintiff takes Issue that he did not administer, to which the Defendant demurred specially, that the Issue was immaterial & per Curiam, on reading the Record, a respond' ouster was awarded; and Hale Chief Justice rebuked (Wine) who demurred being meerly for delay, for Executor Defendant must say the other did administer, but the Executor Plaintiff need not be said to administer, which hath been the constant known difference. So Upton and Noell, and Baud and Bennet. (54.) Executors.

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DE
Termino Michaelis

Anno 1672. in *B. R.* 24 *Car.* II.

Wednesday, October 23.

Hale Chief Justice. {*Twisden*, *Rainsford*,} Justices.

Davies *and* Tosier.

(1) Slander.

LEvins excepted against a Prohibition in a libel by Baron and Feme for calling him Cuckold, per quod she was in danger to be punished in the Spiritual Court, for incontinency on 2 Roll. tit. Prohibition 296. §. 18. the Court agreed that the words alone are not suable in the Spiritual Court by the Husband alone, as 1 Cr. 110. pl. 104. Eaton, but by the Wife they are, and per Curiam a Prohibition was denyed upon this special suggestion.

Chamberlain *and* Bidirel, *Thursday*, Octob. 24.

(2) Arbitrement.

IN an Action upon the Case on several promises to four on an award and intire damages. North Solicitor excepted in an arrest of Judgment, that the three Arbitators awarded the Defendant 170 li. for salary, and the Defendat pay 50 li. to the Plaintiff one of the four, which he hath not paid which is grounded on a joynt account of five, which was to be stated which is not, nor said to be in satisfaction of the four, also this is not said the salary agreed on, but per Curiam this will be intended according to agreement, but as to the Assumpsit being to four, one cannot bring an Action, as Stiles 296. pl. 643. on an Assumpsit to the Father to pay to the Son, the Action must be brought by the Father especially, because the Father

Father was to settle and here the Defendant on which the promise is made is due to all four, but the promise may thus be maintained by the Son on evidence also in consideration A. and B. whose Cattle were distrained would pay, the Defendant promised to deliver the cattle, adjudged the Action lay joyntly as made, but if it had bæn laid severally the Evidence might have maintained it, Stiles 156. pl. 356. also Rippon and Nortons Case, 3 Cro. 849. an Assumpsit to the Father to pay the Son Beaten 20. li. in debt was held good by the Son, because the whole consideration did rise from him and so not like the Case in question, so Clemens and Patison where C. ex parte of himself and the part, owners submitted and P. ex parte of the Master and Mariners; the award was that C. pay to P. to the use of himself, and the part owners, adjudged good. But in all these cases the party concerned may have debt on the award, and per Curiam it was stayed.

Wigg *and* Fulti. *Friday*, October 25.

(35) Assumpsit.

IN an Assumpsit on agreement betwæn the Plaintiff Administrator of the Legatee and the Defendant who married the Administrator of the Devisor, that the Plaintiff should accept of the Defendant 100. li. in three months in full satisfaction of the Legacy of 100 li. and the interest, and that on the payment thereof should release all the profit thereof, in consideration whereof the Assumpsit is alledged mutually. Barwel excepted in an arrest of Judgment, that there being no obligation by the agreement to pay the same, the Assumpsit is not sufficient, sed non allocatur. Acceptaret a prædicto defendente & super solutione to release is sufficient as Williamsons Case, Arbitrement to pay at the House of J. S. & super receptione Inde, the other should release which was held reciprocal, upon this reason, that when one was obliged to pay the other is impliedly bound to receive, and especially when nothing is to be done by the Defendant, but to pay as in consideration of 5. s. Assumpsit firmam facere was adjudged good, as to warrant a debt implies to pay, and Judgment for the Plaintiff.

Leniel *and* Harslop. Hill. 20 & 21 *Car.* II. Rot. 281.

(4) Common. SPecial verdit in an Action upon the Case for a Common sine Grantée of Common apurtenant, for four beasts levant and couchant on two yards land, and that Grantee by deed pole infeoffs the Plaintiff of one close, parcel of, &c. and Common for one beast, not said levant and couchant; and if this be a Common in gross or not was the question, which the Court inclined it cannot. And said, 1. that Common appendant is for cattle levant and couchant and passeth by grant of part of the land, but cannot be granted in severans. 2. Also a Common apurtenant may be severed and granted, because nothing restrains it to cattle used on the land also if it be for cattle levant and couchant it may be granted; with the land but not without it: And had the grant been of a fourth part of the two yard land, with a Common for one beast it had been good, but whither this close being not (by what appears a fourth part of the two yard land) its doubtful whither one house may be annext to this close, and the Court inclined it may, levant and couchant being not necessary in common apurtenant, as F.N.B. but as Estovers advowson, and a sheep walk may be incident, to a part of a farm, as 1 Cr. 432. and Sacheverels Case, 1 Cr. 482. so of Common for certain numbers, as in Lincolnshire the possessor of the least Cottage hath Common for one thousand sheep, which is apurtenant and by prescription, and need not be levant and couchant as such that have Common apurtenant may put in gift cattle if it be for certain number; also the Case Trin' 1658. of Stone and Mussenden was not for a certain number, but pro averiis suis generally, its therefore said apurtenat as Advowson, Piscary, &c. to a house by prescription, so incident. Sed adjornatur.

Calfe

Calfe *and* Bolt.

IN Debt upon a Deed which by the bond appeared to be quod cum the Defendant per ſcriptum ſuum Indentat recitaſſet, that he had ſold certain Lands, that the Defendant promiſed in conſideration of 20 s. in hand and 25 l. after to build a new mill, and pull down the old one on the hill, &c. after verdict on nil debet. Shouldham excepted in arreſt of Judgment. 1. That this is but an hiſtory, ſed non allocatur, the Bargain being but an inducement to the promiſe which is the ground of the det. 2. Nil debet is a ſeofayl and void Iſſue, ſed non allocatur, though it be an improper Iſſue, and nothing but non eſt factum, or an acquittance or releaſe by deed could be pleaded, yet its not immaterial but void by verdit. 3. Becauſe the new mill is not ſaid to be built in the ſame place, ſed non allocatur, being ſecundum agreement. And Judgment for Plaintiff. (5) Agreement.

Carter *and* Haggard. *Saturday*, Octob. 26.

IN an ejectionæ firmæ after pleading not guilty, a releaſe is pleaded puis Darrein continuance whereby the firſt Iſſue is diſcharged, which the Court granted, as Lewis and after Judgment Error, and a Writ of Enquiry on 16 & 17 Car. II. Cap. 8. Stroud prayed to ſet all aſide; but per Curiam, though the Juſtices cannot try it at niſi prius unleſs they think it but colour and inſufficient, yet if it be ſufficient he muſt ſign a Bill of exceptions, for the trial is Error, and ſo Yelverton 181 pl. 255. and in this caſe the releaſe of Carter leſſor of Plaintiff is but colour, alſo the party cannot demur to ſuch plea, alſo the agreement to try and ſtand on the title only is no cauſe to overrule ſuch plea; & per Curiam, the plea certified hither was allowed notwithſtanding ſuch agreement being gained after ex motione Stroud' to ſet it aſide. (6)

Dominus Rex *and* Daniel Acklandby, &c. *Monday* October 27.

(7) Treason. IN an Indictment of Coyning, Rainsford directed the Jury that one witnes was not sufficient being for Treason, but per Twisden at Common Law it is, but not on Ed. 6. cap. but by a later Statute coyning is left to be tried at Common Law, but the witnes not being of credit, verdict was for the Defendant.

Monke *and* Clayton. *Tuesday*, Octob. 29. Ante.

(8) Bankrupt. MR. Attorney Finch prayed that money of the Plaintiffs being a Bankrupt and an immediate debtor to the King by returns of money from the Commissioners of Excise (which in truth was from one Thistlewait a Collector) might not be delivered out of the Court to the Assignee of the Commissioners on Norwich, ca. 4. Car. I. in the Exchequer, that the King in such Case shall be first satisfied, contrary where his debt is but in aid of another, sed non allocatur, but the money ruled to be delivered to the Assignees, and that the King may by Scire facias against them recover it.

Burghes *and* Bowman. *Wednesday*, Novemb. 30. Trin. 23 *Car.* II. Rot. 1010.

(9) Leases. IN an Ejectment on the demise of Dr. Charleton of a House in Oxon, by agreement to take it for the yearly rent of 50 l. and the Plaintiff to repair a lease to be drawn by St. Thomas's day, and the lease then to begin, and another agreement by Notes to let for seven or eleven years, at the Doctors election to be engrossed and that no lease was engrost. And Holloway for the Plaintiff, that this is no lease but a tenancy at Will, which the Court agreed thereby; but the point intended was that the first being a perfect agreement cannot be surrendred by latter Notes of agreement, but the Court said this sheweth the intent and for the Plaintiff, there being no words of demise, and if there were yet Covenants being to be inserted and no certain time, as Harrington and Wise, 3 Cro. 486. pl. 2. Hubert 35. Tisdell and Essex. It is no lease.

Elborough

Elborough *and* Yates, Trin. 24 *Car.* II. Rot. 1313.

DEbt on Obligation, on Oyer it was to ſtand to award of Maſcall, ſo that it be ready to be delivered at the Houſe of Maſcall, the Plaintiff ſets forth the award delivered at another time and place, which the parties accept and aſſign breach in non payment of money, to which the Defendant demurred, becauſe the Plaintiffs acceptance will not make the Award good though before the time limited, being not delivered at the place appointed. (10) Arbitrement.

Hales Chief Juſtice agreed that the parties acceptance could not make this good if void, but being not, ita quod it be delivered at the houſe of M. but ready to be delivered its implicitly intended ready at the day and place being delivered before, as payment before is ſo at the day.

Twiſden Juſtice, the day may be ſalved by acceptance before, but not the place, and it ſhould be averred it was ready to be delivered at the place whereof this delivery before may be an evidence.

Raynsford Juſtice, this is ready to be delivered at the houſe of M. being actually delivered before, though at another place, and the party might have refuſed ſuch delivery, and had no body been at home at the houſe of M. yet it had been ready, &c. Sed adjornatur.

Davenant *againſt the Biſhop of* Salisbury, Hill. 23 & 24 *Car.* II. Rot. 868.

IN Debt for rent by Heir or Executor, he muſt ſay the Teſtator was poſſeſſed, and ſo of the ſucceſſion of Biſhops, he muſt, in debt, or as here in Covenant, ſay he was ſeiſed and convey the reverſion by deed for Biſhop, Dean or Corporation cannot be intended ſeiſed in other capacity, as Plowd. Com. 101. in Fulmerſton and Steward, and covenant to pay all taxes, is not intended of any other taxes then ſuch as were in being and uſe before, and anciently contained in the leaſe, and that was only againſt Synodals, Procuratorys, Tenths and Subſidies, and not to charges of another nature; and the Succeſſor is not bound but only by ancient charges, but not conveying and averring any ſeiſin of reverſion by deed. A nil capiat was awarded. (11) Rents.

Smyth

Smyth *and* Danvers. Pasch. 24 *Car.* II. Rot. 346.

(12) Assumpsit.

IN an Action upon the Case, on indebitatus & insimul computasset, the Defendant pleads the account quæ est eadem, and that thereon it was agreed to give day to come longer time, to which the Plaintiff demurred, and Judgment for the Plaintiff, non assumpsit being a salve for all, and it was never allowed to say that one sum is the same without traverse of the other, being contrary to the declaration in diversis aliis denariorum summis, and also this plea amounts to non assumpsit as to the second, as Child and Guidal, Stiles 243 pl. 557. if the day be not over, but if the day were past it had been well enough, but the more general practise is to demur especially for the amounting to general Issue; and its substance and not aided, and as to this Judgment ought to be for the Defendant, but the parties agreed to pay costs and try all de novo upon non assumpsit pleaded to the whole, which the Plaintiff accepted to mend, &c. but verdit would aid all.

Bredgall *and* Lashington, &c. Pasch. 24 *Car.* II. Rot. 447.

(13) Payment.

IN Scire facias against the Defendant as bail of Towers, they pleaded that the principal paid the mony on the first Judgment, to which the Plaintiff demurs, & per Curiam, the principal cannot plead payment, but the bail may, for the acquittance belongs not to him, as recognition by A. that J. S. shall pay mony on Judgment, the party shall not plead payment without acquittance but A. may, but the payment after the Judgment and before the Scire facias is not good in time no more than death of principal after Cap' Ret' and before Scire facias: Also on covenant to pay 20 l. by single Bill in debt, payment cannot be pleaded without an acquittance, but on another specialty to pay the same 20 l. by the party or a strangers payment is pleadable without any deed or acquittance, and the Court ordered the parties to take Issue on payment.

Munday

Munday *and* Frogat. Trin. 24 *Car.* II. Rot. 1489.

IN debt on Sheriffs bond the Defendant pleads 23 H. 6. c. 10. and that I.S. sued a Writ out of B.R. against the Defendant, and that the Baily of a Franchise took this bond in the Sheriffs name which is alia forma and so demurred, and by Saunders this is void, as if the Sheriff had taken it in the name of the Baily of the liberty, which the Court agreed, when taken as Baily of liberty, but Baily of a hundred generally is the Sheriffs Baily and gives him security but hundreds, that have retorna Brevium, as here is a Franchise, but Hundred by Grant that hath Baily put in by particular Lord is but his Servant, and the Sheriff usually makes another Baily to execute there, as Lord Cooks Case, 2 Car. I. was done also, the Bailies of the Franchise on 29 Eliz. cap. 4. takes all execution fees. Also it was long debated that rescue from Baily is ex custodia mea, and here is no return made by the Baily of Franchise of the Writ, nor by the Sheriff quod mandavi, &c. but Baily of Hundred may waive his franchise and arrest as Sheriffs Baily, and then he may take obligation in the name of the Sheriff also. A mandavi Ballivo where there is none makes Sheriffs liable to the Action upon the Case as disherison to the King; also the Statute 23 H. 6. is not as in Print, that the Sheriff nor any de ses but any des Officers, &c. and so old Rastall that is in French, and so resolved in Langhams Case in debt on obligation made to Lenthall, the Defendant pleaded it was for ease, which was held to extend to the Marshal, though none de ses Officers, but one des Officers and Ministers of Justice, and so on the Statute of Winton, the Roll is to satisfie in forty days, though the Lord Cook say in six months before the Action can be brought, but it appearing the Franchise had no Goal though they had retorna Brevium, being the High Peak in Darbyshire parcel of the Dutchy, this is a waving of his Franchise, and all Bonds being thus anciently taken, the Court inclined strongly the bond was good. Et adjornatur. (14) Sheriffs.

Holman

Holman *against* Dodde.

(15) Amendment. IN Debt on Obligation on Condition, that Brograve lessee of the Plaintiff perform Covenants in Indenture, on performance pleaded the Plaintiff assigns breach in not payment of rent at Mich. (which was payable at Mich. by the lease, but then or forty days after by the bond) the Defendant rejoyns that the said Defendant did pay at Mich. & de hoc ponit se, &c. & præd' plt̃ similiter, after verdict, Staples excepted in arrest of Judgment that Issue is misjoyned, and though it were quod prædictus Robertus who was the Defendant for Rowlandus that was the lessee and the directions to the Clerk was right, yet being no Issue there is no verdict, and so not aid by the late Statute, 17 Car. II. cap. 8. and here its no Issue that the Defendant perform & de hoc ponit, &c. & prædict' plt̃ similiter, for 1 Cr. 317 pl. 380. its an Issue by the rejoynder that Robert did not pay, &c. therefore not aided by 2 Cr. 579 pl. 9. Aldridge Case, also the rent is reserved at Mich. only by the lease, though the bond be at Mich. or forty days which is well enough. Sed adjornatur.

Mors *and* Slew.

(16) Admiral. SPecial verdict in an Action upon the Case on Custom of the land against the Master of a Ship for the loss of goods by robery of a Ship in the Thames, Holt for the Plaintiff, the Master receives these goods generally to kæp as 4 Co. Southcots Case Co. Lit. 89. and only Guardian in Socage who hath the custody by Law, and factor who is servant at the Masters dispose, and so cannot take care, are exempt.

2. The Master is to have a reward for his kæping and therefore the proper person against whom the Action should be is he, this is the reason 2 Cr. 188. Jelly and Clerke of a Carrior, Hoyman and Inkæper, thus Moor 876 pl. 1229. and in Hub. 18 Rich and Needhams Case, and though the Master hath his salary from the owners, yet the contract for fraight is made by the Master in his own name, with the Merchant and the Master is to do that which is consequence of it to kæp the goods, and were he a servant Dr. and St. 137. if he contract in his own name, Dyer 230 & 2 Cr. 250. Yelvert. 137. pl. 194. he is the principal debtor. Also in the Civil Law Exercitor navis takes no care of fraight, therefore this Master is but a servant,

ſervant, and the action againſt him only exercitoria, becauſe the owner took all the care to lade and fraight wine, as Pl. Com. 827. but the exercitor now is per averſionem, the Maſter who takes care of all.

3. The Maſter of the Ship hath a remedy over againſt the wrong doers, as Lit. Co. 54. on permiſſive waſte, ſo Goaler, 33 H 6.1. on Traytors breaking priſon, alſo the Maſter he may have Treſpaſs or an appeal of Robbery, and on a freſh Suit Kell 70. he ſhall have reſtitution, and the Damages recovered by the Maſter ſhall bar the Owners, ſo Haydon and Smyth, 13 Co. 69. alſo the miſchief is great if no action lye by reaſon of the great truſt Merchants put in the Maſter, and therefore he need not prove any perticular defaults as de lege Nautica, Pl. Com. 3 & 15. & 29. and in Antonius Fogaſſa, 822. though the injuries happen without the Maſters default, miles fatale divum accideret Lex mercatoria 103. alſo the Bills of Lading ſhew this, that the goods well received are to be redelivered, the dangers of the Sea only excepted, which cannot be foreſeen nor avoided; and this differs from Piracy, which as Locemans 121. & 3. Inſt. 112. is a danger at Sea or Common Enemies, and Locemans de jure maritimo 140. Strecka de mercatura 448. Alſo 2. here is a neglect in the Maſter having no greater gard then four which is found to be the uſual number, but not by time out of mind, or by cuſtom or preſcription; alſo the men that robed were permitted to enter, but it was found they pretended to be preſs Maſters.

Winnington for the Defendant, 1. That here is no ſuch neglect as to ground an Action upon; the Declaration being on the cuſtom of England, as againſt Inkeeper, Carrier, &c. Regiſter 105. & F N B. 94. B. yet in neither is there any preſident againſt Maſter of the Ship nor other, but what is grounded on wilful or legal neglect, and this non feſans and want of ſufficient numbers cannot be a neglect in Law, as 8 Co. 33. Calyes Caſe 4. reſolved & 22 H.6. 21 & 38. 2 H.4.7.b. Dyer 158 pl. & Dyer 266.pl.b. Spencers Caſe, and Hill. 32 Eliz. 1. Roll.3. and Moor 462.pl.650. Woodlifs Caſe, for he that looſeth theſe goods is not to pay the Defendant any thing but to the Owners of the Ship whoſe ſervant the Maſter is p hac vice, and in Hub. 17. a reward is expreſly averred to be given to the Hoyman and the Maſters poſſeſſion is the Owners; alſo here is a cuſtom found that four was the uſual number which in verdit is ſufficient without ſaying time out of mind, Lit. Co. 182. alſo Wellwoods Abridgment the duty of the Maſter of the Ship is only to look to the goods but not to anſwer for them. 2. Suppoſing a neglect on which the Merchant ſhould have

remedy, it lyeth not against the Master but against the part Owners, here being no Charter-party found, whereby if the Master be partner he is liable, but else the Master is a bare servant and sueth Owners for salary, and in nearer voyages to places known, Charter-parties being only used for long voyages, also he that hath the benefit shall answer for the loss, 11 H. 4. 45. & 1 Roll. 4. so Poph. 178. Latch. 126. the Master shall sue for the robbery of his servant, and the Carrier shall answer for his servant, and though the servant may sue the robbers yet so may the Owners also, and there is no privity betwæn the Master and the Merchant, and the Master hath no propriety in the Ship nor reward of it, and in the Tygre of Plymouth, the last Dutch War, who was robbed as here, one Hawkes the Merchant on consult with the Civilians and Common Lawyers was advised against bringing any action. 3. Here is not guilty found as to the point of neglect on which the later part of the declaration is as a special Action upon the Case, but its left on the common custom, as Carrier, &c. Sed adjornatur.

Duke of Buckingham *and Lord* Pembrooke. *Wednesday*, Novemb. 6.

(17) Chattels.

IN Trover and Conversion of divers goods, it was said that a great Picture in the Hall at Wilton was nailed through the frame to the Wall and so fixed to the freehold, to which Twisden inclined, as Hangings that are nailed round about cannot be removed. But by Hale Chief Justice and Raynsford, such things as use not so ordinarily to be so fixed, though they be nailed yet may be removed, as Hangings, &c. contrary of a painted cloth nailed round. 2. The Defendants title to some goods was by assignment of the Defendants Grandfather old Philip Earl of Pembrook Administrator of William to Sir Ben. Rudyer, &c. to the use of his Will, which p Curiam is done by every administrator to alter the property that the goods may go to his Executors, also the Will directed all his goods to the her, and hath no particular reference to the Deed, and therefore a reassignment by Ruddyer may be presumed being common if there be any footsteps of such reassignment as here there is by possession in Earl Philip Father of the Defendant after, and his Executors paying debts by that Will, and its good to express trust in such Deed of assignment least the Trustæ be outlawed or under Execution by Elegit, &c. the trust of a Chattel or Goods being no more to be

be entailed than the things themselves, also Sir Benjamin Ruddyer should be party to Earl Philips Suit in Chancery the Father of the Defendant, if there were no reassignment and verdit for the Plantiff, that there was a reassignment of Damages 8000 l. and the Court commend the Verdit.

Dominus Rex *and* Baker. *Thursday*, Novemb. 7.

(18) Ways.

IN an Information for travelling with more Horses in the Wagon than the Statute 14 Car. II. cap. 6. § 11. allows, Polyxphen excepted in arrest of Judgment, that the Wagon is not said to be loaden for hire. 2. Its for travelling with seven Horses and the Defendant said he used but six Horses in length, not saying not in pairs, but per Curiam this is not within the Statute, also the Information lieth not in B. R. &c. Sed adjornatur.

Turnstall *Lessor of* Greve *and* Grathooke. *Friday*, Novemb. 8.

(19) Challenge.

IN an Evidence in the trial at Bar it appeared that the husband of the mother of the Infants Legatees in Will of Michell took bond of double the sums to be paid when the Plaintiffs heir at Law did enjoy the Lands in question against the Will, which per Curiam is to the testimony of the mother and not only to her credit, and though it were releast yet this being a Champertous Interest created by the party, the Release doth not enable her as on release of legacy it would, that is created by Act in Law, but by consent she was sworn, but per Curiam, a Will solemnly made cannot be repealed by every contradiction especially, when no other is extant, and the Plaintiff was nonsuit.

John *and* Lloyd. *Saturday*, Novemb. 9.

(20)

WIonington prayed a Prohibition to the Arches in Suit by appeal for a Mortuary begun in Landaff on the Statute 21 H. 8. cap. 6. that after debts and legacies paid he should as Vicar have a Mortuary not laying any custom, because Wales and Chester are excepted out of the Statute to be paid as used, and the Suggestion is no Mortuary hath been used, and this plée refused, and though 1 Cro. 172. Hind. versus Evesq; Chester, it be held that the custom is triable in the Spiritual Court, Kell. 110. b pl. and not here by

Jones and Whitlock, yet there are two Judes Contra, and the Court inclined no Suit can be in Wales on the Statute. Sed adjornatur.

Downs *and* Duckworth.

(21) Amendment. IN a second deliverance the Defendant demands Oyer of the Record of the Replevin which was in this Court, and being after verdict demurs, but the Plaintiff doth not joyn in the demurrer but pleads nul tiel record, for the variance in misentring the Record on which the Defendant takes Issue, and now by Barwell prayed, to amend which the Court agreed. And by Hales Chief Justice, where Oyer of a recovery is demanded that is in another Court he that grounds his Suit thereon must give a Copy, the which if wrong nul tiel record may be pleaded, but anciently nul tiel record could not be pleaded of Record in the same Court, but lately it hath been used to plead nul tiel, but then it must be without demanding Oyer and not else, and therefore all is here mistaken and no second deliverance can be after verdict, and paying costs where the fault is an Amendment was granted -----

Dominus Rex *and*

(22) Return. HALES Chief Justice conceived that the Defendant Mayor of Penzans may plead to a return of a Rescue being in nature of an Indictment as in ancient time, he that was taken with the manner might be arraigned and pleaded thereon. Twisden Contra, and that the constant practise is so, but the party submitted to fine being on an Attachment not on an Action.

Thomas *and* Sorrel.

(23) Wine. IN the Exchequer Chamber North the Kings Sollicitor pro Rege. The only question is, if on 9 Jac. and the Proviso of 7 Ed. 6. the Patent to the Defendant Citizen and Freeman of London within three miles may sell wine without licence. And this depends on the three points before argued. 7 Ed. 6. is a law pro bono publico, Taverns being looked on as disorderly houses and therefore restrained to a licence and approbation of places and persons, the multitude and lowsenes of these being the occasion of the Act. 2. Non obstantes 2 Roll. 179. & Mr. Prins Animad. 128. on Cooks Jurisdiction & Davis 69. are not favoured nor never extended though

though the King may dispence yet this hath no favour, and therefore first this dispensation to a Corporation is not good nor agreeable to this Law pro bono publico, but in things for the Kings sole benefit he may dispence as he pleaseth, being founded in plenitudine potestatis, as his revenue; but where the people have a benefit of the Law he is as a trustee and law makers cannot foresee all particulars; its sufficient the law be good in general, and therefore its hard that particular Cases should not be provided for by the King whose non obstante is not only by forfeiture as a revenue, but as its for publick benefit this is 11 Co. 88. the reason of Monopolies and in dispensation of this nature the King is presumed to exercises his Judgment, therefore the case must be so certain that Judgment may be made, but this case is without measure and so it cannot. 2. The quality hereof is unreasonable being to the Corporation which may be enlarged as the Roman Franchis to all persons within or without the City, 7 Co. 37. a. the King may dispence with particular persons, and though this Corporation be circumscribed, yet as in Coleharbors Case Stidsons Case 2 Rol. 201. & 2 Rol. 179. the King cannot exempt a particular place from a Statute, having the like Interest in the Law as any: Also these bounds comprehend nineteen parts of twenty of the most important places of the Kingdom, and the King may as well dispence with other places, and so with all. Also 3. this dispensation introduceth at least all the inconveniences of delegating the Kings power which in 7 Co. 37. and Cooks Entries 370. Sir Walter Rawlies Case, was resolved the King cannot do, for hereby the Corporation would in effect have power to dispence with the Statute and grant that whom they name under their Seal might dispence would be void, and by consequence the naming any freeman who as such may sell wine is as much, and to say this is a liberty passeth from the King, not from the Corporation, this is but a project on the old penal Laws to have a warrant to the Great Seal, and so to pass, which being of the same end and inconvenience with immediate power to dispence was held void; and where ever inconvenience is seen the law will never allow any colour, as in case of perpetuities; and if such a verbal distinction should prevail the Law would be of no effect; for the practice of Vinters now is to admit any body of their Corporation to defend themselves against the Kings Commissioners; the allowance of this privilege will turn to the subversion of all penal Laws against Coxwainers, Butchers, or any corporation of projectors who would prosecute others that come not in to purchase their freedom, and so would subvert all that

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is resolved against penal laws, and it is a strange contradiction to say the King cannot dispence with the law, and yet may make a body by dispensation to which he may do it, also the dispensation to Waterford, 2 Rich. 3. was in a matter of the Kings revenue of Merchandize, and the Case 2 Jac. of Noris & Malon was without debate or argument and was in the like case of this patent to Clintners, and the prosecution suspected to be by themselves. 2. Admitting this grant good yet it determined by the death of King James that made it, because the King cannot bind his successor which is the height of Prerogative; thus appointment of Judges for life 1 Rich. 3, 4. & 1 Eliz. Dyer 165. or quam diu se bene gesserit, yet they are alterable by the Successor being inter insignia majestatis, the King may give away his Lands, but not his publick Laws, he may exempt from Tares, as Dyer 92. 26 H. 8. 48. & Dyer 52. Davis 15. or other charges, but this Patent is in effect to say 7 Ed. 6. shall be of no force, and that no Successor shall be able to put it in Execution, which cannot be; also this is derived from a personal trust reposed in the King and depend on his person as Sewers, which Latch 170. though the grant be for time certain or absolute yet determined by the death of the King; so of Protections Dyer 278. & 190. and other authorities. It is true the word Licence in matters of interest may amount to a grant, as Licence Lit. Co. 52. b. by tenant in fee or by the King, where he hath interest as Stamf. 30. licence of Mortmain, which is but a casual profit of his Tenure and Subsidies work out of the Kings interest, but the licence in question is not derived out of the Kings interest the King hath the penalty not as an interest nor cannot dispose of it but as a trust, as Laws are the Kings reins of Government on whose death they devolve to the Successor, these licences are relaxatio juris executorii the Law remains, but a pardon is executed and the offence committed against the same King, and the King may as well repeal a Law against his Successor as diminish it, and 2 H. 6. 7. the Earl of Northumberlands Case was but to a single person and a freehold passed by this grant executed and vested, but every retapling is a new offence and the patent executory, and Dyer 278. is a Judgment that the grant did not continue though the reason obiter be otherwise, and Hill. 1659. between the parties this might be well enough, but no binding president to this Court. 3. The effects of the Proviso in 7 Ed. 6. which is a general prohibition within which this Corporation would be, were it not for this Proviso, which Dyer 52. is but a saving, and not like the Proviso for St. Albans

but

but like the Proviſo, 21 Jac. cap. of Monopolies which gives no more than they had before, but it ſaves their lawful liberties, not to be puniſhed by 7 Ed. 6. cap. which is in force to this day, and the King may puniſh on either, that or this laſt Law if they have no licenſe, and that cannot be called a liberty which every man had as to keep a Tavern, this Statute is no ſubſtantive liberty, nor is aſſignable as in Shaw and Haris, in B. R. Paſch. 4 Jac. Rot. 128. in an Information for tranſporting Sheep it was reſolved; alſo this Statute is no prejudice to lawful liberties, and general ſavings are often idle, as for right of I. S. doth not infer I. S. hath right; and here the Vintners having no liberty doth not invalidate the ſaving, and the Parliament never intended hereby to overthrow the Kings revenue, but this ſhall be ſaved by any poſſible conſtructions, and the Parliament never intended the Corporation ſhould have a concurrent revenue with the King which enervates his, and this Statute only intends to leave the Corporation without licenſe, as they were by 7 Ed. 6. and with licenſe as on 12 Car. II. cap.

Levins for the Defendant, that the King may diſpence is agreed by all on the common difference of malum prohibitum & malum in ſe, alſo the act is not prohibitory that no Wine ſhould be ſould, but ſub modo not without licenſe, Bridgm 113. is a diſpenſation on this Statute, and the Inconveniences in reſpect of perſons, time and place, of a Corporation which cannot be ſeiſed to uſe but of an eſtate in truſt they may, but this is a truſt of order or diſorder, as 10 Co. 34. Suttons Hoſpital Lane 21. of Churchwardens may be truſtees of eſtates, and every grant to Corporation is a truſt for government, and in Hub. 14. power to elect Burgeſſes of Parliament is greater than this, alſo the ſcope of all is to repoſe this truſt in the Corporation, therefore its the better rather than worſe that its a grant to a Corporation. Its true the King cannot diſpenſe with a penal Law nor grant power, 20 H. 7. 6. 1 H. 4. 5 to J. S. to make a Juſtice of Peace, 27 H. 8. cap. 24. ſuch powers were reſumed to the Crown, alſo its granted to many Corporations that every Mayor ſhall be a Juſtice, and 21 Ed. 4. 56. Norwich exempted from Juries may elect any freeman who ſhall thereby be free, ſo Yelverton 13 pl. 22. the King Grants to All Souls tenants to be free of Tole, this goeth to all new tenants that were not ſo at the time, this is no delegating the Kings power, but the Corporation never dying are always included in the firſt Grant, all the ſucceſſors being as heirs, and have many more priviledges and truſts than any particular natural perſon can; alſo

also the making too many or too few of the Corporation is not material, all that shall be free being but words of redundance included in the Grant to Corporations and successors; also it cannot be presumed that such as acquire this freedom by service and difficulty will give it away at easier rates, or take more servants or less then is necessary, which would prejudice their own Trade; also here is no negative words that no others shall keep Taverns there but such as are free may; also this Patent may be seised by Quo Warranto, if misuse; and Courts are as uncertain as to matters and things the objects thereof, and so of Fair and Market which are uncertain, 2 Rich. 3. 4. was a Law as much pro bono publico as this Law, it being then felony to transport Wool; also Grant by Ed. 3. notwithstanding the Statute of H. 6. which was future was void, but revived by the Statute of Ed. 4. cap. also as to the time, Dyer 270. is at the most for life, but its plain by Bridgman 113. that such Grant may be in fee or in reversion for lives, and Hill. 1659. the license was for two lives and of their assignees, and Dyer 303 pl. the office of Aulnager pleaded no non obstante and therefore was ill, but the limitation was admitted good for years, and so enjoyed now. And the King may as well Grant in fee as in reversion, and every Corporation hath license to purchase lands to such a value, but without limitation of any time in which or for which they shall purchase it; also the Countess of Penbrooke enjoys the Sheriffwick of Cumberland in fee at this day by non obstante of that Statute; also the inconveniencies of these places might be as well seen then as now, and the Rodes not alterable, and were the license to all the Corporations in England it were good, the King being as able to judge who is fittest to sell. 2. Point, That this license continues after the Kings death that made it, notwithanding Dyer 95. and license Fitzh. 29 & Molineux Case being not a bare license, and till 7 Ed. 6. all Writs determined by the the Kings death and protections are not saved by 7 Ed. 6. therefore fall; also the Judges Patents is but of an authority under the King and shall never survive, and as to Dyer 270 pl. its a Grant without limitation, 3 Bulstr. 125. of time, and so could continue no longer then the Kings life, and 2 Ed. 3. the license 3 Ed. 3. 29. b to alien cannot be executed in the successors time, because this license is in natural capacity as Lord, but this dispensation with a Statute must be as King; also Stanf. 29. the Kings successor hath a corporal service and so its as an attornment which cannot be in anothers time; also F.N.B. 223 Pl. Com. 457. this works as a discharge

charge and restitution not a bare license to do a thing, but 2 Ed. 4. 4. a license to be discharged as from being Collector, its a discharge of the penalty and restitution to what was his Birthright before the Statute, so is to be taken favourably, and that the subject had Quasi an Interest, appears by Dyer 54. a pl. & 13 Cro. 77. Hectornun's Case, such grant and assignment admitted good, and Hill. 1659. Young and Wrights Case, debt on obligation on condition to perform Covenants in an Indenture, which on Dyer appeared to be an Assignment of such a license as in this Case, to which it was pleaded that no rent was due because of the Kings death that made it, and on demurrer there was a rule for Judgment though the Roll be razed, and as to the Cases 2 Jac. of Norris and Mason and Wright and Gerrard, Judgment is for the Defendant on information against the Vintners on the Patent of Q. Elizab. which hath been enjoyed constantly ever since, therefore cannot be presumed false and by deceit; also King James's Patent is but Ratificavit, Confirmavit & acceptavit, and so falls with the Patent of Queen Eliz. 3. the saving in 7 Ed. 6. doth not preserve this liberty contrary to 12 Car. II. cap. as 2 Ed. 3. 6. non obstante against subsequent Law, which is void; also it was lawful at Common Law to sell Wine which 12 Car. II. doth not prohibit, but submodo without license, and the subjects right was as well intended to be saved as the Kings revenue increased, and the Proviso doth not as is said overthrow the Statute; also there is a Proviso in the Patent that the Corporation shall have no more Taverns then 7 Ed. 6. allowed in any the Port Towns; also the saving is to the Corporation of the Vintners of London, not in London nor no negative words.

Okelye *and* Hanby. *Monday*, Nov. 11.

IN an Evidece at Bar in an Ejectment, parcel or not parcel being the question agreed, a special verdict was hereto- (24) Mannor.
fore, whither tenancy by having the Mannor by devise of mesne be parcel of the Mannor and holden of the Lord paramount by distinct tenure, or remains still as a tenure holden of the mannor of the devisee, & per Curiam, adjudged that they were not parcel being by purchase, contrary if the mesne mannor had discended to the Tenant. 2. The Defendant shewed that he held a Court after a decree in Chancery, and after this a witness that was tenant at will to the Plaintiff attorned to the Defendant, & per Curiam, this is a determination of the Will though the Defendant were a meer

Treſpaſſer, but Tenant at Will ſaying he will be tenant to another or he will hold no longer, and yet continuing in poſſeſſion is no determination of the Will, and on this difference it was adjudged in
betwæn Sarjant Wilmot and Holden, where a ſtranger entring upon a Tenant at Will was by his attornment adjudged a good tenant to a præcipe and a recovery ſuffered by him, but verdict for the Plaintiff on other evidence.

Scot *and* Bell. *Wedneſday* Novemb. 13.

(25) Aſſurances.

IN an evidence at Bar in an Ejectment, the Plaintiffs Leſſor Sir N. Hubard claimed as Creditor of Bell; the Defendant by a ſettlement 11 Jac. made by Husband for joynturr of the wife, reciting that the wife had joyned with the husband to ſell part of the former Jointure in which he and ſhe were Tenants for life the Remainder in tail to the firſt and tenth ſon, remainder to his heirs, which was ſaid to be fraudulent, but Hales Chief Juſtice contrary on Valens and Wingfield 1653.
ſetlement on mariage on husband and wife, remainder to his heirs males, which was held not only a good conveyance as to the husband and wife, but as to the remainder to his heirs males, though this were not within the merit of the conſideration, and that he might marry another wife, and the reaſon was all was looked on as one intire agræment, and ſo it may be the wife would not part with her Joynture unleſs proviſion were for children alſo; though he alone might, having no Iſſue Bar this contingent or remainder, as 1 Cr. 102 pl. 115. Pigot & Smyth and Sir Edw. Cookes Caſe, Godbolt. 289. pl. yet being then doubtful this is ſufficient without any articles or agræment, precedent being all done at the ſame time, and the heirs male had a prejudice by this, and to this Raynsford Juſtice agræd, and hereupon the Plaintiff was nonſuit, and Sir Rich. Temples Caſe was the ſame with this, where Sir Thom the Grandfather ſetled without conſideration to his ſon John, and after ſetled them in conſideration on his Grandchild Sir Peter on mariage, and on many debates ruled no fraud, being made by Thom the Grandfather to John his ſon, before and without any proſpect to the mariage of the Grandchild Sir Peter, and the Lady Baltinglaſſe could never get over this, ſo Wig and Villars, 1 Roll. 796. l. 10.

Cole

Cole *and* Levingston, &c. *Saturday*, Novemb. 16.
Ante.

IN an Ejectment on demise of Kinsey lessee of Zinzam and Crook and Lord Starling, &c. (26)

Hale Chief Justice expressed himself as to the families as five Tribes and the discendants of them in Capita, and as to these the settlement 3 Jac. by old Sir Peter Vanlore was on those severally in Tail, and on default of issue by each the remainder by the fifth Proviso is if Mary Powell, or the Glenhams, Cesars and Vandebend, and all or either of the daughters dying without Issue to the use of the survivor, and survivors of them according to their several and respective parts and the heirs of their bodies, and for want of such issue to his right heirs; provided that if the Cesars bond be sued his part shall cease and remain over to the other four, and the like on disturbance by young Sir Peter Vanlore, which serves to expound the Deed though no question be on these later Provisos though somewhat varying from the other; its found the Lady Powell levied a fine to the use of Basset with warranty against her and her heirs, which Basset levied a fine in 1651. also to Levingston, and that Levingston by Indenture making Basset tenant to the Præcipe suffered a recovery as vouchee, and afterward Hill. 1651. a fine was levied by Levingston to Mason of the moety of the Cesars, a fifth part to the use also of the Trustees of Levingston, and after Levingston and the Trustees assign to Skinner and they all levy fine of this fifth part in 1656. and after there is a fine levied by Skinner and Levingston to Mason of the fifth part, and after 1657. they levy a fine of the moety of the fifth which was the Cesars. 2. As to the Glenhams part 26 March 1654. Glenham sells to Gosnall a tenth part of the Lands of Sir Peter Vanlore and all other his shares thereof, 1 Sept. 1654. they convey over, and after a recovery is had against the conveyee of a tenth part of all the land, not saying any thing of the shares and proportions, and at this time H. Glenham was dead without issue, and so a part of his part came to the two other Brothers, this recovery was to the use of Robert Marriot, 19 Jan. 1656. Glenham, Gosnal and Bray sell to Marriot the tenth part and all their lands aforesaid, and levy a fine accordingly; after Coxe and Bray convey to Stephens. 3. In April 1656. Abraham Vandebend levies a fine to Lee of a fifth part of all the lands in question, and at the same Term a recovery is had, and at this time Peter

Vandebend was dead without issue, and John left issue John, and Abraham who was the only survivor, so was tenant in tail of the three of five and tenant for life of ⅖ remainder in tail to John, and of the third part that survived he was tenant for life, and so committed a forfeiture as to this, which is all but a tenth of this ⅖ but as to the other two thirds of the fifth he was tenant in fee. 4. In 8 Decemb. 1658. Cesar covenanted to levy a fine of a moety of a fifth of what was setled 3 Jac. by old Sir Peter Vanlore, which refers to the Tribe of the Cesars which stands intire and untoutcht in Anderson who after levies a fine to Vandebends; also as to Peter Glenhams moety of the fifth part or tenth of the whole, which when H. Glenham died without issue and his third part survived to Peter and Sackvill for their lives only till the joynture severed 25 May 1656. Peter bargains and sells to Nevill his tenth part of all his shares and parts of the first setlement, and Trin. 1656. the Bargainee suffers a recovery vouching Peter to the use of Peter, and in June 1656. Peter covenants to stand seised to the use of himself in tail of the tenth part only, which is only the moety he had by the Glenhams which docks the tail, but as to the moety of the third of the fifth part by the death of Henry its a forfeiture, but Peter being dead without issue this will go over, 15 Car. II. May 10. a conveyance of the fourth of the fifth of all is made to the use of Skinner which works no more than what was before, but the special tourn of the Case is by 8 May 13. Car. II. the Statute made to vacate the Lady Powells fifth part and voids her fine and securities, and discharges the tenants and occupiers of the profits paid, after this a fourth of a fifth is setled on Anderson, but this is of no use the right of all being saved; after this its found the heirs demised to Kinsey who demised to the Plaintiff. The design of the setlement, 3 Jac. was to lodge a fifth part in each Tribe of Vandlore, Powell, Glenham, Cesar and Vandebend, and this is attained; another design was that if any Caput of these Tribes die without issue that nothing of his share should go out of the Tribe till all the Tribe be spent, as when H. Glenham died his part was not to go over so long as any of the others, lived this he hath not attained. Because 1. by a limitation by way of use a cross remainder cannot arise by implication as from Peter to H. and Sackvill or contrary, so is Nevills Case, 2 Roll. 837. it may in some Cases do so in a Will but in no Case in a Deed. And 2. if this were admitted yet cross remainder cannot arise between three without express words, as Dyer 303 pl. which without alterius eorum, 2 Cro. 655. Guilbert and Witty were void but between two

two there may, but the limitations to the Daughters of Sir Peter are three so to the Vaudebends and to the Glenhams is five, and though Powell be but one and Cesars two yet his intent cannot be denied. 3. He intended if one Tribe failed the fifth part as of Lady Powell &c. should go over to the other four Tribes else he could not attain what he drove at to keep them in equality, which he hath not attained though there should be cross remainders, as when the Lady Powell died without issue or the Cesars sued the bond, the words being to remain to the survivors and the survivor of them which must be applied to the Capita and cannot go per stirpes without a new deed; and adding according to their several parts aforesaid is utterly void and uncertain, there being five Tribes according to their Tribes, so there are parts per Capita as in the Sackvils, and Peter Glenham, therefore its insignificant. 2. If this should be so it would cross the main design of the deed which was to go by parts, and now there are but four living, so there would be a redundant part to the other Tribes, which was against the design of equality in the first settlement, also should the fifth part be distributed by Tribes the Case would be more entangled, as if Glenhams when she died had died leaving each a son they would be defeated of their parts, the consequence of this is that the Proviso is good for so much as can stand, and the words according to their several parts be rejected and it shall remain to all the survivors, and all the (or's) as 5 Co. Windhams Case shall be construed distributively through the whole, which will be of use as to the Glenhams and Vandebend, but not as to the Lady Powels part, quando non valet quod ago ut ago valeat ut valere potest, 2 Roll. 90. § 5. in Furs and Weeks, Mich. 1649. devise to daughters equally to be divided, to hold to them and the survivors of them, which was construed for a joint estate tail with several inheritances, and so here on dying without heir it shall remain to all the survivors, and consequently the Lady Powells fifth remains to the seven that survived, as joint-tenants for life with several estates tail of a seventh part. 6. This remainder to the survivor is a pure contingent remainder, 10 Co. 17. for the Law cannot tell who nor what estate till her death. 7. Though by this Proviso there be contingent remainder that ariseth on failing of each Tribe, yet there will no new rising contingent remainder be, as of the seventh of the Lady Powells fifth, as to the Tribe of the Vandlores and Lady Powells being the only parts resolvable by Arithmetick, the Plaintiffs must have Judgment for the fifth part of the Vandlores as copartners or survivors, and

and as to the Lady Powells fifth part were there no fine by her death her part goeth to the seven survivors per Capita by the Proviso, as joint estates for lives with several inheritances in tail of each part as on gift to seven and their heirs the reversion in fee in Sir Peter Vanlores heirs who are Lessors of the Plaintiff; also when Sackwill Glenham, 25 March 1654. sells his tenth part and all his share, &c. he passeth his seventh part of the Lady Powells part and consequently as to him the jointenancy of this seventh part is broken and his Bargaee is tenant in common and no survior, but his common recovery of a tenth part doth not extend to this seventh part of the fifth nothing more than his tenth being compised; but he having issue this is descended to him, and not material as it is in the Case of Peter Glenham who died without issue, and his Bargain and Sale of all his share, &c. doth carry not only his patrimonial part of the Glenhams but his part by survivorship of the seventh of the fifth, but his recovery of a tenth, as before, doth not take this in and so as to Peter also the jointure is severed as to $\frac{2}{7}$ also by Levingstons fine his and his Wives fifth and seventh part are gone to Skinner, and as to the four remainig parts of the fifth, Crooke, Zinzan, Vandebend and Mary Starling are untoucht, and they are jointenants of these for life with several inheritances in tail. And 9. when Peter 1656. died without issue his seventh part reverts to the coheirs of Sir Peter Vanlores, as when one jointenant for lives aliens, its for life of the Bargaee only, and after his death that part reverts to the coheirs of young Sir Peter, because there can be no cross Remainder, but they are in as in the reversion in coparcenary in the third seventh part of a fifth, and are jointenants with Abraham Vandebend of the fourth of the seventh part of the fifth; also when Mary the Mother of Starling died a third of the seventh of the fifth discends to her son the Plaintiff, the other four seventh parts survive to Crooke, Zinzan, and Vandebend and consequently of four sevenths of a fifth they are Joyntenants with severeal inheritances, so one seventh of a fifth belongs to the the Plaintiff, and two thirds of four sevenths of a fifth, and two by the fine of Lady Powell to Bassett with warranty, by which all the contingent remainders that should take effect on her death are destroyed, and consequently had there bẽn no more the title of the heirs of Sir Peters Vanlore would be let in on her death without issue, as on feoffment by tenant for life the remainder to the seven they would be let in. But secondly the reversion in fee in the coheirs is discontinued, so though they might oust the conusee yet the warranty is a

Bar

Bar to Sir Peters heirs, being also heirs to Lady Powell, and though they be heirs of the Donor yet the reversion by the warranty notwithstanding the Statute W. 2. cap. 1. doth Bar as effectually as a remainder, as Evans Case, Moor 96 pl. 239. the Statute being not intended of a collateral warranty but that they should not, alien post prolem suscitatum, (Sanl and Sydenham 1 Cr. 156. pl. 168. Garranty 16.) as Co. Lit. 374. & 2 Inst. 335. and though they were within age or covert yet the warranty attaching when their right was discontinued is a Bar, though not so when their Entry is congeable. 3. Here is a good estate lodged in Levingston and transferred to Skinner while the fine stands. 4. By the Act 13 Car. II. Enacting that the fine, uses and warranty be void to all intents, and that it shall be lawful for any having lawful title as if none were levied, and all securities given to Levingston on the fine are voided, and this sets all right again in the same state as before, purging the discontinuance and taking away the warranty and revests all the contingent remainder, and all the mean conveyances that extend to this fifth made by any to whom the estate is limited as by Levingston Glenham, &c. stand in the same plight as if fine were never made, the consequence whereof is that Sackvills bargain and Sale, and by Peter severs the jointure as to those shares, and Levingstons fine is good only for his seventh part of the fifth part, and could be no extinguishment thereof to give advantage thereof to the heir but really passeth it to his Conusee. For 1. this is not a fine levied when he had nothing in the land but with the land, but the act giving every one his due passeth this; also by this act all the nonclaims mediate betwéen the Lady Powells fine and reversal are not material, because now the fines operates on the seventh part only, and though the fine be of more it hurts not the rest without an actual ouster, but if new five years were necessary 13 Car. II. gives new five years, as when H. seised in fee by fine aliens and is attaint of treason, and five years pass the wife shall have new five years after reversal of the attainder for dower, but if the fine did not operate on the seventh part it would be of some more advantage to the heirs at Law, because if after recovery I alien, and after reverse the recovery, Moor 270. this will not make good the sale, as the Lady Baltinglass and Sir Richard Temple on gift to two sisters and the heirs of their bodies, one dieth and the other suffers a recovery of the whole which was a forfeiture of the moety she had for life, and though this were reversed yet being executed is not aided, as Moor 132. pl. 278. Bosvill against the Town of Bridgewater,

and

and Dr. Druries Case, 8 Co. 142. and 3 Co. 29. Butler & Bakers Case, though generally fictions do work no wrong yet they do not always resettle things executed, the difference is where the reversal is by Error, which maketh not good such acts that would not be else good, its but legis declaratio according to Law established, but the reversal by Act of Parliament B. 43. is a new Law of as great strength as any civil act and gives new title to all, voiding the fine to all intents, and saves rights which reversal by Error doth not, and had there not been a Proviso to discharge the tenants they would be liable to account, 3 H. 7. 15. Selengers Case, Chattels vest are devested, and the like of a mesne Remainder, 4 H. 7. 10. Parliament, Br. 41. 10 H. 7. 22. which is set up and trespass mesne made dispunishable and petition. 2. The Spencers reversion their attainder and purchased land and conveyed it away, and by Parliament this reversal is reverst and by Scot this makes all stand as if the first attainder stood; so the Lord Cobhams Case, the remainder by Statute limit to heir according to the Will of the person attaint, Adjudged good; by the retrospect of the act it was doubted whether it would vest in George Brook that was attaint, but fully agreed that it did settle in William the heir of George and Judgment in Exchequer Chamber was affirmed according, this being an Enabling Statute breaks through all the difficulties that obstruct, and so here though in an ordinary assurance this would not be sufficient, yet in an Act of Parliament all such petty inconveniencies are broken through that hinder the design of the Act and so as to the parts aforesaid, Judgment for the Plaintiff, and as to the other parts they are infinite, for by the forfeiture of Abraham Vandebend four ninths of a third of a fifth, and six sevenths of a ninth of a third of a fifth may come to the Plaintiff, which on the different measures of the Tribes, & Capita will be infinite, as to the other Tribes that have issue which lets in the (or) and (and) and as to Glenhams death, there were ten survivors some of which died without issue whose parts are inexplicable.

Twisden and Raynsford on several conferences had privately said they all agreed in every particular as to the points of Law.

Dominus

Dominus Rex *and* Broughton. Ante.

SImson excepted in an arrest of Judgment in an Information of several extortions and crimes of which she is found guilty, but there is no certainty of time but between 2 May and 2 May two years after. 2. Its said she received several sums generally Extorsive colore officii which is not sufficient. Sir William Jones contrary, when many acts are for the Kings interest, such and such a day is sufficient, which the Court agreed; and that if any part of the Information be good its sufficient for fine: also the Information for Wines and in the Exchequer for forfeitures are so without any, viz. at day certain. Sed adjornatur. (27) Fees.

Stanly *and* Harper. *Monday*, Nov. 18.

IN an Assumpsit on several promises on sale of several Vessels of Currents, one was to pay for one at the lowest rate that the other were sold for by the pound. 2. An Assumpsit to pay what the Currents were worth by the pound, to which the Defendant pleaded they were worth but 13 l. and profers that in Court, and Issue that they were worth more, found for the Defendant. And 3. Indebitatus found also for the Defendant. Polyxphen excepted in arrest of Judgment on the first promise, that its nonaginī & tria quarterī & unius centum ponderaī that its insensible sed non allocatur, verdict being for the Plaintiff. 2. It was not said that any to whom the Currents were sold paid for them. Sed adjornatur. But a nil capiat was granted on the first exception. (28)

Dominus Rex *and* Nele.

SYtherfield excepted in arrest of Judgment in an Indictment for nusance in a way in the Parish Latch. 176. of Great Saint Bartholomew, on the Ward of Faringdon, extra in a place called Cloth Fair, not saying a quo or ad quem Ducens; sed non allocatur, for all ways are all over England and so is Latch, and being after a view, though but a Gettee or Balcony, is a nusance. Judgment pro Rege. (29)

Cole *and* Levingston. *Tuesday*, Novemb. 19. Ante.

(30) Entre.

AS to Vandebends part and Henry Glenhams part, the Chief Justice advised that a fine with proclamation and five years was in the way though no ouster and no entry found, which of a bare Tenant in common is no Bar, but the doubt was whether being by one tenant for life in common with the other that had the inheritance, and so a forfeiture needs any Entry to be found. Sed adjornatur. As to the Judgment Hales Chief Justice said there must, &c.

Champian *and* Atkinson.

(31) Copyhold.

IN evidence to a Jury at Bar a special Issue by rule of Court was to try the Custom of Lady Prices mannor of Westwood in Cumberland, whether fine on the tenants or Lords death be due to the heir or successors of the Lord during his minority, and the Plaintiff said 4 H. 7. and in 3 Ed. 6. time there were Gresham fines i. e. ab ingressu paid to Lords Infants, but it was agreed by the Defendant that dropping fines i. e. when tenants die are due to Lords Infants or not, but the latter only to men of full age of the Lord, and if he die before age as the Earl of Northumberland her Father did its gone: also the admittance is for life of the Lord, and tenant so upon Lords death the estate of tenant is gone till new admittance, which is made at a general Court of Dimissions held in the Mannor for that purpose, but the tenants are never disturbed of possession, & per Curiam it lieth on the Defendant to distinguish a fine being generally due. 2. The Defendant excepted to Steward that he had for son admission, sed non allocatur, but he was sworn. 3. Evidence for the Defendant was that other Manors adjoyning had the same custom not to pay till age, which per Curiam is good, and was allowed of Copyhold entailed in Manors of Thistleworth and Hammersmith in Middlesex, and the Dropping and Gresham fines being all one promiscuous, the verdict was for the Defendant.

Dr. Sud-

Dr. Sudbury, *&c. and Archbiſhop of* York. *Wedneſday*, Novemb. 2.

IN an Attachment upon a Prohibition by the Dean and Chapter of Durham againſt the Defendant, the evidence was on title to the Guardianſhip of the Spiritualties during the vacation of the Biſhoprick of Durham, to which the Plaintiff made title from 1226. Grayes time, on Quare imped' Fitzherb. 165. & per Curiam, its good Evidence, and ſo is Lamberts Perambulation, and Twilden ſaid Beomonds Caſe, 9 Co. was given in Evidence, and Godwins ſucceſſion of Biſhops, p. 463. and Linwood 232 and Seld. Hiſt. of Tithes 373. all agree the Archbiſhop hath it of common right, but Dean and Chapter may have it by cuſtom and uſage only, which in England is generally, but not ſo elſe where, and verdict for the Plaintiff as to the preſcription, but as to the contempt, for the Defendant, no evidence being as to that. (32)

Cholmly *verſus* Cooper *and* Ward. *Thurſday*, Novemb. 21.

ON Lee and Boothbies Caſe,
It was ſaid by Hale Chief Juſtice, that a leaſe for years of Lands that are Copihold, particularly without taking notice it was Copihold, this is good for the rent of the Copiholder, and after the leaſe ſpent the Inheritance, takes place and ſevers the Copihold from being granted by Copy after during the leaſe, but when that is ſpent its parcel again which was agreed in evidence to the Jury at Bar in an Ejectment on Sir George Sands Patent and Verdict for the Defendant. (33)

Tremenhere, &c. *verſus* Paſco Triſilian. *Friday*, Novemb. 22.

IN an evidence to the Jury at Bar in treſpaſs of taking and for ſpoiling a Shipwrackt, the Defendant claimed property by ſale of Maſter of the Ship, which cuſtom per Curiam, is void without a ſpecial procuration by the owners, but as Hub. 11. pl. 23. Bridgmans Caſe, the Maſter may pledge it or charge it for proviſions or allowances for Salvage, i. e. reward (34)

ward of such as assist to preserve the Ship or he may sell perishing goods in extremity to preserve the Ship, but not the Ship no more than his part, but no custom was proved. 2. The damages were alledged by loss of a voiage intended, which per Curiam provision being made is not barely consequential but is recoverable, as on taking away a Horse going to Market, the loss of Market shall be in the damages besides the value of the Horse; so in Trespass for cutting a hole in the Plaintiffs wall, making a pair of Stairs, per quod the Plaintiff broke his Arm, and damages was recovered for all, in Lions Case, and Damages were directed as to the provision and wages of Seamen, but not as to Voyage farther than agreement with the Merchant for it which was not; and verdict for the Plaintiff and 1600 l. Damages, viz. 1200 l. Ship, 40 l. Goods, the Interest and the rest for the Provision.

Matthews *and* Gage. *Saturday*, Novemb. 23.

(35) EX motione Symson for Attachment against Bailyes that by process out of the hundred Court had attacht a Flock of Sheep, which per Curiam hath often bin ruled as unreasonable and can be but of one thing and the value of 5 s. is sufficient for an appearance, and taking more is illegal; also driving them into Franchise and there Attaching them was another contempt, and an Attachment awarded nisi.

Dominus Rex *and Lady* Broughton. Ante.

(36) THE Judgment of the Court was a hundred Mark fine, and that she be removed from the being Keeper of the Gate-house, and that it be seised into the Kings hands, saving the right of all parties, the Office being forfeited in strictness, and so it was committed to the Sheriff of Middlesex in the Interim, and this was grounded on 39 H. 6. 18. the Duke of Norfolks Case which on search of the Roll appeared to be on the Marshals shewing his right, and that he that committed the forfeiture was but tenant for life, the Court displaced the tenant for life only and put in a new deputy, and so Quousque Curiæ constiterit, that the Dean and Chapter of Westminster have right, & Curia ulterius ordinaverit, as Distress till Replevin.

Carpenter

Carpenter *and* Smith. Trin. 22 *Car.* II. Rot. 1163.

IN an Ejectment, the title was on Covenant by William Pergitor on marriage of his son John to stand seised to the use of himself for life, remainder to Mary, remainder to John in fee, and if John died living William, then to the right heir of William and to the heirs of such heir and fine is levied according to the same uses afterwards, William bargains and sells to the Defendant, John dieth having issue Francis lessor of the Plaintiff and whether this destroyeth the contingent use was one question, which in case of transmutation would be clear and not revive, however without a new Entry, otherwise by bare Covenant to stand seised: also bargain and sale without valuable consideration doth not destroy the contingent use: also as to what is limited to William and so to John with the contingent is destroied as to the heir of William, yet that remainder in contingency is clearly destroied having no particular estate, and the verdict hath not distinguished what part is a contingent use and what a contingent remainder, and so no Judgment can be, though the contingent remainder to the heir of William is destroied, but the limitation to John in fee without any estate for life to William, Provided if he die living William that it be to the use of the heir of William, here the fee when John dieth before him rests in William, who by lease and release without notice or consideration conveyes to the Defendant, which doth not destroy the contingent use that riseth out of the fee conveyed to the conusees of the fine, and therefore they not joining their Estate may preserve the contingent use though William sell, especially being not for valuable consideration, per Twisden, contra per Hale Chief Justice, no heir being at this time when William sold the estates are confounded; And as to Lovells Case, though while Williams estate was untouched his estate preserves the contingent remainder, yet there should be an entry by the conusees who are the Defendants, found to revive to the contingent use, as fine by A. to his use in fee, provided if A. die or do such an act then it shall be to anothers use, and before the contingent hapens A. leases and releases, the entry of the Conusees must be found to revive the uses, as Cooks Case the conveyee comes in under those that have the use, as on disseisin there can be no seisin to the first uses. Sed adjornatur. (37)

Parker

Parker *and* Stroud. *Tueſday,* Novemb. 26.

(38) SYmſon prayed an amendment of Scire facias de terris & catallis in the C. B. on the Scire facias in pety Bag, being ill againſt an Executor though there, and in C. B. they make Scire facias againſt others in that form which was heretofore agreed paying coſts by rule, but after the Plaintiff ex parte obtained an order of the Maſter of the Rolls in Chancery to amend without coſts, which the Court diſſallowed, becauſe the Maſter of the Rolls cannot make orders in the matters of the pety Bag.

Dominus Rex *and* Baker.

(39) STroud prayed Judgment in an Information on 14 Car. II. cap. Confirm 22 Car. II. cap. 12. for travelling with above five Horſes in length being a common Carrior contra Stat, Hale Chief Juſtice ſaid, here being a Prohibition and a penalty in the Statute the fine cannot reaſonably be higher than is ſet by the Statute, though the Information be only on the Statute and not for the penalty; but this is Indictable and Suable here, as on Statute of Liveries and Drunkenneſs, and though no part be given to the King by this Statute, yet on 1 Cr. Tries Caſe, and in Exchequer on the Statute 2 Car. II. cap. 2. for Iriſh Cattle Judgment may be on the Information, though the Information be not ſaid pro Domino Rege and the party, yet this may be diſtributed after, and the King may prefer Information for a charitable uſe or for other ways, but on 2 Cr. 644. Caſtles Caſe, and 11 Co. Dr. Fosters Caſe, and Pl. Com Stradling and Morgans Caſe. Sed adjornatur. Poſt.

Coger *and* Childe.

(40) IN debt upon Indenture of Charter party whereby the Defendant did covenant to part owners after oyer, the Defendant pleads that he is no party to the Indenture, which is an ill plea and ſhould be non eſt factum. 2. Its by a per quod teſtatum exiſtit which is ill in debt though not in Covenant; but per Curiam its well enough here in debt as on Articles, though teſtatum exiſtit in debt on demiſe is ill. Sed adjornatur. Poſt.

Wilſon

Wilson *and* Pig.

IN debt by the Plaintiffs leſſee for twenty one years of the Defendants tenant for life, the Defendant pleads that after the Defendants demiſe, the term was by Plaintiff ſurrendred and drowned, to which the Plaintiff demurred, & per Curiam, had this redemiſe by the Plaintiff to the Defendant been by Deed it would be good for the rent, as 2 Cr. 487. Wootton and By, but this aſſignment being but by paroll, and being a ſurrender there is no remedy for the rent againſt him that hath the reverſion, and in the Caſe of Manſell of Lincolns Inn, debt on ſuch an aſſignment was held a rent and not like an obligation to pay money at ſeveral days which lieth not till the laſt day. 2. The reſervation not being by Indenture was held well enough being a real contract. Sed adjornatur. (41) Surrender.

King *and* Welling. *Wedneſday*, Nov. 27.

RAynsford put the Caſe that Robert M. ſeiſed in fee deviſed to Barnard for life, and after to Iſſue by any ſecond wife, remainder to John M. proviſo that Barnard may ſettle Jointure on the ſecond wife, B. married, Robert died, the wife of Barnard died, B. bargains and ſells to the ſecond wife for jointure, then died, and the queſtion is what eſtate Barnard had, whither tail executed and ſo cut off by the recovery, and ſo his Covenant to ſtand ſeiſed to the Defendant his ſecond wife is good, but if B. hath but for life as I hold he hath with a contingent remainder to the iſſues of the ſecond wife, being ſo limited expreſly after the death of B. as 1 Co. Archers Caſe, where Robert had but an eſtate for life being by expreſs words: alſo on 6 Co. 18. Wilds Caſe which was reſolved by all the Judges of England that Rowland and his wife had but an eſtate for life, and though there were children there and none in our Caſe, yet even in this Caſe its ſaid they have but for life, though by deviſe to them and children living they take jointly; and agreeable to this is 3 Cr. 313. Clerke and Days Caſe, and 1 Roll. 837. deviſe to the eldeſt ſon and ſons of his body is but for life in the eldeſt, and the ſons of him are purchaſors, and Blunket and Holmes Caſe, Thomas had but for life with a contingent remainder to Leonard. And 2. Barnard being but tenant for life his power to make a jointure is extinguiſhed by the common recovery, being not ſimply collateral which is one ſort, as 1 Co. 173. Digs (42) Eſtates.

Caſe,

Case, power to revoke; there are also powers appendant to an estate as to make Leases or Jointure in præsenti: also powers in gross and not merly collateral as to make Leases in futuro, both these later powers 1 Co. 101. Albanies Case may be destroyed by fine or feoffment, and Barnards power is of the second sort, and he hath accordingly made an estate in present which being appendant to the estate to which, &c. being altered, Noy 66. the power is gone, and by the common recovery the estate for life of Barnard is forfeit and so cannot charge the estate forfeited, which cannot be but powers in gross not derogating from the estate granted remain, as Pasch. 19 Car. II. Edwards and Slaughters in the Exchequer was adjudged. 3. Admit the power be not destroyed its not well executed being without reference to his power and so shall be intended to issue out of the estate, he had as 6 Co. Sir Edward Cleres Case, and so Judgment ought to be for the Plaintiff lessee of John Barnard.

Twisden Justice ad idem, It must be agreed that to the issue of the body do not ex vi termini by limitation carry an estate Tail, but to a man & exitibus is words of purchase and they take jointly, but were there no Issues at the time its Tail because they cannot take Jointly, nor by remainder nor by purchase, therefore rather than the Will shall be void its presumed to be Tail, and if the words had bin to Barnard for life, and after his decease I give to the Issues of his body this cannot be Tail but for life, as devise in perpetuum is fee, 15 H. 7. 12. but for life in perpetuum is but for life, so of a devise Tr. 1649. Rot. 1239. [illegible] to Daughters equally to be divided and to the survivor of them makes Jointenants, so Co. Colliers Case, devise paying 10 l. is fee, but as Bullen and Bullen devise for life paying 10 l. is no more but for life: also here the Issue are not intended to come in by discent but by remainder by the words I give it to issues which is of the same Import. 2. The Proviso to make Jointure explains he must have such an estate that must need that power to support it, as 1 Cr. 177. Ansley and Chapmans Case on devise of Lock where condition not to alien implied an estate but for life, so 8 Co. Foxes Case, bargain and sale for 10 l. raiseth a use; but if any clause sheweth the intent other, as Letter of Attorny to make livery makes it void as use, and as tenant in Tail he may without such power by recovery make Jointure. 3. For want of such issue to John, &c. had made an estate tail in Barnard, because nothing would thereby, vest in the issue but in the Devisee Owen being a clause by it self, but in our Case this clause is coupled with others

others repugnant to it, and therefore the remainder to John in fee, vested only subject to the interposition of Issue when they come in being though the remainder be not contingent as to the Issue, and I rely on 6 Co. 16. Wilds Case and Bendlos is a variously reported Case to the men Children is held Tail, and Owen 148. in Lilly and Taylors Case, saith it was but for life, and with this Cooke agrees. 3. The recovery by Barnard is a forfeiture and consequently the power that ariseth out of the privity of the original estate is destroyed, that and the confidence in the person being gone. 4. It was on special verdict in Guildhall adjudged that lease for years by tenant for life with such power did Issue out of his power though it might Issue out of his estate, but be it executed or not the estate is but displaced and John may enter and so his lease to the Plaintiff good.

Hale Chief Justice for the Defendant in the conclusion, though on the first finding and opening he were of their opinion, Barnards recovery was in the life of the first wife to the use of himself in fee, and after covenants to stand seised to the use of the second wife now Defendant. And 1. he agreed that if Bernard had but for life the power is destroyed, because recoveries for the recompence in value bars all powers, rents, recompences and conditions, though without a recovery or alteration of the estate in some Cases it may not be destroyed. 2. He agreed that if Barnard have but for life and his power not gone its not well executed, because that its not always necessary to recite the power where the estate cannot be effectual without it out of any interest, so is 6 Co. Sir Edward Cleres Case, had he disposed of two parts before the third would have passed, and in Rogers Case for Blanford forum, lease by tenant for life without reciting power is good, and could not have continuance without it; also by Covenant to stand seised Mich. 1651. Stapletons Case, power to make Jointure by tenant for life by Covenant to stand seised was held good because it cannot rise otherwise, but that which spoils the execution of the power is the gaining a new fee by the recovery, which though defeasible is sufficient for the estate made for jointure. But 3. that which is the main matter considering the consequence and parts of the Case, he held it an estate tail in Barnard, it must be agreed that devise to him that hath a wife and the heirs of his body by a second wife is an estate tail executed, and the import of this Will is the same and intention, 39 Ass. 20. hath some influence, as to a man, & hæredi & uno hæredi ipsius hæredis is tail, &c.

where the intent appears, which is the reason of estates made by implication, it must be admitted that if devise had born to B. and the Issue if he then had none is tail, and he agreed that if he had issue at the time as Sawyer and Taylor, 4 Eliz. Rot. 541. C. B. its but a joint estate for life, also devise to B. and after his death to Issue Children, &c. is an estate for life if he hath Issue at the time with remainder to the Children, which is the sole point of Wilds Case, and though the Judges were devided Popham and Gawdy that it was tail, yet by the rest resolved in Exchequer Ch. in Yardly and Richardsons Case, the same with Wilds Case, it was held but for life and here its Tail. 1. Because Issue is nomen collectivum and doth not take in only the first son but every generation there being no Issue at the time, so its stronger than Remainder limit to Children, & ex vi termini comprehends all Issues mediate and immediate in common parlance and in all Statutes, as in Westmin' 2 cap. 1. exitus is made equivalent to the heirs of the body, so upon the entails of the Crown by H. 8. and the word Heirs are words of limitation in estates not that its more extensive than the word Issue but more appropriate, and Clerks Case
lease for years to begin after death of Son without Issue after a setlement was on that Son, and it fell out the eldest Son had Issue a Son who died without Issue in C. B. and in B. R. and in Exchequer Ch. resolved that it began when that Issue died without Issue; and the difference between the words Issue, Children and Heirs appears by Sawyer and Taylors Case, cited in Stiles 240 pl. 551. Mich. 43 & 44 Eliz. in B. R. T. had Issue four Sons and devised to Wife, and after her decease I will my land to D. and after his decease I will it to my other Children part and part like, and whither the Son of one of those Sons were within the words Children or not was the question, and ruled he was not, the word Children being not so comprehensive as Issue. 2. In respect of the special manner of limitation to the Issue of his body by a second Wife, and in Wilds Case it was admitted that to a Man and Children of his body if he had none is Tail. 3. The devisor takes notice B. had no Issue. Also 4 the devisor did not intend John the younger Brother should take before the Issue of B. the elder failed, as 1 Cr. 5 Car. I. Spaldings Case, devise to the eldest Son in fee, and if he die during life of the Wife to the second Son, was to prevent crossing the Will by disheriting the eldest Sons heir, construed for a dying without Issue. 5. The remainder is not limited over, but if B. die without Issue, and if devise be to A. for life, and if he die without

without Issue the remainder is over, its as Dyer 174 pl. Frenchams Case, no Estate Tail by Implication unless as Hill. 4 Jac. Robinsons Case, devise to I. S. and if he die without Issue without other limitation is Tail, but not without special circumstances, Hill. 43 Eliz. Burleighs Case, and here it was intended nothing should go over to John so long as B. had Issue, and so its all one as to heirs of body, 1 Anderson pl. 96. Bendlos pl. 124. cited Moor 397. pl. 579. and by Lord Cook to this purpose, and so admitted that it was a devise not to a Man and Wife, and Men Children of their Body, but to Baron and Feme and after their decease to Men Children, and as to the Case of such devise, Mich. 10 Jac. Partridges Case, 1 Roll 837. it was devised to B. for life, & non aliter, but agreed that if it had been generally to Son and after his decease to heirs Children or Issue of his body its Tail, and Blunket and Holmes Case, was to Son Tho. and after his decease if he died without Issue which be it an entail its Barred by the recovery, or if contingent the remainder to Leonard is Barred, and this is but for life in Tho. but if it had been to Tho. and after his death to Issue, it would be Tail and this is our Case, and 6 Co. 18. Wilds Case, B. R. were divided, some because in the premises there was a devise to B. and the heirs of his body which would be so to R. if so intended, some held the word Children general; but the reason alone on which Judgment was given was because he had Children alive at the time. And its said in the end of the Case that after their decease they might take by way of remainder if they had no Children, which is no authority nor comes to this Case, Children being only made nomen collectivum to serve the testators intent, but the word Issue is of its own nature, and Moor 682. pl. 939. cites King and Bibe devise if A. dieth not having a Son, then, &c. which is made tail, and 10 Jac. Partridges Case was a devise to Children, and the objection that its here limited for life and therefore it cannot be tail; this is one intention but there is another intention that John should not have it so long as Barnard had Issue, and tenant in tail hath an estate for life Quodammodo as to pernancy of profits; also its the Law expounds this an estate tail by consequence, as Pasch. 1651. Pausy and Lowdale, devise of Copyhold to the eldest Son for life, and to the heir of his body, and ruled a devise in tail though thereby the estate for life were drowned, and it was said that 1 Co. Archers Case, and Owen Lillies Case was but for life being to A. and the heir of his body and to the heirs of such heir, but to the heir male of the body generally is tail, and so of Issue which

is an agregation of all heirs but to A. and his Iſſue, and the Iſſue of ſuch Iſſue is but deſignatio perſonæ and A. hath but for life, but to Baron and Feme for life, the remainder to their Iſſue is tail; alſo the power to make leaſes doth not aid, for tenant in tail can no more make leaſes then tenant for life, and the teſtator did not intend the tail ſhould be altered by the recovery, and as it remains tail this power is neceſſary as to tenant for life; but Judgment for the Plaintiff, reverſed after in the Exchequer, ut Audivi.

Turner *and* Taylor *and* Uxor.

(43) Bar. & Fem. IN Trover againſt Husband and Wife for a converſion, ad uſum ſuum proprium, it was moved in arreſt of Judgment that this is ill, being all one as ad uſum ipſorum, and Judgment was ſtaid ex motione Newdigate, Poſt 204 pl. 6.

Gallant *and* *Thurſday*, Novemb. 28.

(44) Treſpaſs. WIthens excepted in arreſt of Judgment in treſpaſs of taking goods, not ſaid ſua, & per Curiam this is ill and Judgment ſtaid, but in cuſtodia ſua exiſtent' were ſufficient.

Holman *and* Dodd. 161. pl. 15.

(45) Amendment. IN debt on obligation and condition to perform Covenants, in an Indenture wherein one Covenant was that Rowland Brograve ſhould pay rent, to which the Defendant rejoyns that ipſe idem Robertus ſolvit, &c. & de hoc, &c. & prædict' plt ſimiliter, which per Curiam is aided after verdict, but if it were in the negative miſtaken it might be otherwiſe, as 1 Cr. and Judgment for the Plaintiff.

Cole *and* Levingſton. 190 pl. 26.

(46) Partition. JOnes prayed Judgment of the fifth, and of the ſeventh of the fifth of Peter Glenhams part, and of thirty two of one hundred ſixty and five which is the ſame with two thirds of four ſeventhſ of a fifth, but agréed to attend in vacation to ſet all right and entera nolle proſequi for the reſt which was accordingly done the Term after, Infra.

Dominus

Dominus Rex *versus* Story, Lenthall *and* Geery.

(47) Guardian.

THE Court fined him a 100 l. and good behaviour for five year on Information for deceitful taking away out of Mothers custody Mrs. Gilborn under sixteen years old with intent to marry her and riot, &c. Geery fifty pound and good behaviour for a year, Lenthall forty Mark and good behaviour for a year, who were Women assistants in the exploit and found guilty only of the deceit.

Tuston *and* Whinney.

(48) Collusion.

IN an Action upon the Case on faulse and fraudulent sale, affirming that the Horse sold was not inclined to blindness. Saunders excepted in arrest of Judgment, that this is incertain as that a Horse is inclined to be lean or to be fat; Symson prayed Judgment on 2 Cr. 630. that this being scienter as Action upon the Case for false affirming on sale of Sheep that they were kept in good pasture and not in such a place which was bad, which was resolved to lie, which Hales Chief Justice agreed, and if it had been said he had been Poor blind it would be sufficient, and so by Twisden, Action upon the Case lieth on false affirming he had power to sell a Horse, so upon false affirming rent of House sold more than it was, but here inclination is uncertain. Sed adjornatur.

DE

DE
Termino Hillarii

24 & 25 *Car.* II. in *B. R.* Anno 1672.

Thurſday, January 23.

Hale Ch. J. } Judges. } *Rainsford*
Twiſden } } *Wilde* ſans ceremony.

Dominus Rex *and Dr.* Cluer.

(1) Prerogative.

IN an Information againſt Dr. Cluer of Crydon for a Barretor, Jones the Kings Counſel prayed coſts on the Entry of nolle proſequi, the Jury being ready to try it to morrow, ſed non allocatur, none being allowed in the Caſe of Benſon, nor would the Court order Entry of it, nor ſtay the Entry of it, nor can the King alter it after it is Entred, but before he may repeal his Warrant given for it, but Maſter Attorney refuſed to ſtay and ſo it was Entred and the trial diſcharged; Wilde Juſtice being removed hither from C. B.

Dominus Rex *and* Levet.

(2) Certiorari.

ON Certiorari to Juſtices in Gloceſter to remove Indictment of force againſt Levet and Tipping unde Indictati ſunt, an Attachment was prayed for not removing an Indictment againſt Levet only; & per Curiam this Writ is joint and ſeveral, but Error doth not remove a ſeveral Indictment, but this being but a miſtake in Judgment and no notice to the Juſtice of it, the Court denied the Attachment being in order to fine, nor any reſtitution till the Record come in.

Luckham

Luckham *and*

(3) Slander.

Polyxphen opposed Prohibition in suit by Baron and Feme in Spiritual C. for calling the Husband Cuckold and poor Cuckold, averring that hereby in the place where spoken was intended to charge the Wife with Incontinence & per Curiam, it was denied on 1 Cr. and so hath been the later opinion.

Blacket *and* Lumley. *Friday*, Jan. 24.

(4) Error.

Error of Judgment in Hexam in Replevin, the Defendant avow Damage feasant, the Plaintiff claims common to a House under Blacket, the Defendant traverses that Blacket and all those whose estate he had have had common, and verdict for the Defendant, and *Svenire fac* is of Fallowfield H. &c. and ideo præcept est, not said ad Curiam nor ad tunc & ibidem, per seneschallum quod venire facias ad eandem Curiam the same day, and Northey and Brown 1655. was reversed for that Error, & per Curiam its well being ad eandem Curiam the same day. 2. Its & quia nec, &c. for & qui nec, &c. which per Curiam is ill, and for this Error Judgment was reversed, its hard but the locus in quo being not Infra, &c. Judgment was reversed.

Bond *and* Mosedale.

(5) Fees.

EX motione Offley to be discharged of Chamber rent, for which according to common use and Printed note he gave bond on taking out of one Spencer a prisoner to be a Witness, and to return him and to pay his Chamber rent, which he tendered for the time he was out, but being demanded for more he prayed to be discharged being illiterate and never agreeing for it, & per Curiam he was discharged, and the Marshal ought not to take bonds for Chamber rent, but only to be prisoner, &c. but this is only to come in as allowance of fee.

Turner

Turnor *and* Taylor. Ante. 100 pl. 43.

(6) Bar. & Fem. IN Trover against Husband and Wife for Conversion, ad usum suum proprium, which notwithstanding, 1 Cr. 254. pl. 296. Humfryes and Reads Case is well, and 7 H. 4. 15. or must be referred only to the Husband being after verdict, that finds the Trover part being thus actionable and part not Co. Entr' 41. for else it should be sua, but per Curiam as Symson and this was held ill and Brief Fitzh. 644. so ever since, and notwithstanding Yelverton 165. Latch 126. Newmans Case, and 1 Leond 312. Judgment quod nil capiat, suum being the same as ipsorum, as where he and others convert ad usum suum refers to all, and its not fit to reverse a constant course for any single Case.

Porter *and* Starling.

(7) Fees. IN an Assumpsit by the Plaintiff to an Attorney for mony the Solicitor laid out and for fées, to the mony non Assumpsit is pleaded, and as to fées the Defendant pleads the Statute, 3 Jac cap. 7. that there was no Bill, as Smart and Weal in C. B. which was in Case of a Solicitor which was after a verdict, and so the Jury find it a debt, but this is by an Attorney who hath not demurred specially but generally, and therefore no action lieth without a Bill either for fées or charges all being wrapt up in one sum, & per Curiam a nil capiat per billam nisi, which by Hales Chief Justice is a perpetual Bar.

Bishop *and* Reeve.

(8) Assumpsit. ASsumpsit as an Administrator on an agreément to pay 5 l. a year, and the Testator to find a light Horse for five years, the Action is & non Assumpsit, and the verdict for the Plaintiff, and Judgment affirmed in Error out of C. B.

Gerrat *and* Knight.

(9) Arbitrement. HOlloway prayed to set aside an Attachment, and Rule of Court on an award made unreasonably sed non allocatur, for be the award good or bad being on reference agréed by Counsel, whereby the Cause is put off, on Westm 1. cap. there ought to be a Rule for performance for the abuse to the

the Court and consent by the party & per Curiam, the C. B. are now satisfied to grant these Attachments, and that not only for not submitting to the Award as was resolved by all the Judges at Oxford, in the Case of Lord Howard Earl Marshal, but also for not performance, and so it was Granted.

Welch *and* Bell.

(10) INfants appearing by Attorny was assigned for Error, & in nullo est erratum pleaded, to which the Plaintiff demurred on Yelverton 58 Kings and 1 Bulstr. 37. pl. 28. because the averment is & hoc paratus est verificare prout Curia consideraverit, and should be only & hoc paratus est verificare, but the Court conceived this all one and leaves it to the Court only to direct the manner of trial, and this doth not make up an Issue but leaves the Plaintiff to reply, which by the demurrer is prevented. Sed adjornatur.

Ridley *and* Morilee *in Escape.*

(11) ERror of Scire facias in which the Defendant pleaded that he was in Execution & contra voluntat' of the Sheriff he escaped, to which the Plaintiff demurred on 1 Cr. 240. Robinson and Clayton and Vintners Case, Allenson and Butlers Case, Symons and Cockmans Case, it hath been adjudged as well on Scire facias as in debt, that though it were by permission it were no plee much less on escape contra voluntatem of the Plaintiff or of the Sheriff, and were it a voluntary escape yet on the Sheriffs death no remedy is against the Executors, and in C. B. Wild and Tyrell were against Vaughan and Archer, that its no discharge, and so is 40 Ass. 10. and the reason of it was for the Sheriffs ability to answer which is no satisfaction, and the body is but a pledge, and therefore all may be taken that are joint and severally bound, though but one execution can be had with satisfaction; also were he retaken he shall be in execution as to the party, and its the same reason here, and Judgment affirmed, nisi.

Hughs *and* Eveſque London.

(12) SAunders excepted to a preſentment in Læt of a Manor for not ſcouring Ditches ad nocumentum diverſorum, &c. which per Curiam is ill and ſhould be ad commune nocumentum, and then though generally it needed only beſide præſentatum, yet if for a cuſtomary matter it muſt be alſo averred he did not do it being iſſuable, and Judgment reverſed in Error of Judgment in Treſpaſs before the preſentment removed.

Dominus Rex *and* Braughton. *Saturday*, January 25.

(13) SR. William Jones prayed to inſert into the Judgment that the Office be forfeited, which the Court denied, becauſe hereby not only her term would be forfeit but the Inheritance of the Dean and Chapter, and this is not an Information on the right, but ordered the Judgment to be to ſeiſe into the Kings hands.

Dominus Rex *and* Baker.

(14) STroud prayed Judgment pro Rege, the only queſtion being whither any Information here lieth on 22 Car. II. cap. 12. the King having no part of the fine, but per Curiam on 1 Eliz. cap. 2. of recuſants, ſuch Information may be here though the penalty be diſtributed to the poor and others, and on 8 Ed. 4. cap. of liveries, Moor 564. pl. 770. it being an affirmative act, it was ruled that the Information lay in the Exchequer, and the Courts here give reſtitution on 8 H. 6. cap. 9. though it be given to Juſtices below, and on H. 8. cap. it was reſolved the party may be ſued here, but the ſame Judgment muſt be given here as below; alſo if there be any prohibitory clauſe that none practiſe Phyſick there an Information lieth, but if it be that if any practiſe then ſo, &c. there no Information lieth: alſo this was intended to be done flagrante crimine and not in two years after as when here it may, and this would diſquiet the Country, and 18 H. 6. cap 11. it was ruled 3 Cr. 326. Agars Caſe, that Juſtice not having 20 l. per annum, cannot be Indicted, yet on 3 Jac. cap. 2. party not coming to Church may be Indicted for his 12 d. but this is not ſo properly to be eſtreated as to be levied by

by Warrant to the Churchwardens, and the Court concluded the Information lay here as on 4 Jac. cap. 5. for Drunkenness. Sed adjornatur.

Baily *and* Mum *and* Silby. Ante.

IN an Ejectment on lease by Charles Bucke Vicar of Cranbrooke in Kent, special verdict find Fletcher Vicar and seised of the Vicaridge, and 3. Octob. 3 Eliz. demised to Port-reeve for ninety nine years for six shillings rent, confirmed by the Patron and the Dean and Chapter, that during this lease there was an alteration from three to seven Houses, that Cranbrooke is a Market, and that these Houses are no part of the Mansion, they find 13 Eliz. cap. 20. and the Statute of Non-residence 21 H. 8. cap. 13. & 14 Eliz. cap. 11. Fletchers lease expired 1661. then Cooper leased for three years to Goulston for 20 l. per Annum, and before the expiration of that he made a new lease 11 Septemb. to begin at Mich. next which was confirmed, and all the rents (but one shilling for one) greater; then Cooper died, and Buck was made Vicar, &c. Sir William Jones for the Plaintiff, 1. That this lease by the death of the lessor is void, by 13 Eliz. cap. 20. by Non-residence, the words being not conditional which is saved by the act of God but by limitation, which as 3 Cr. & Moor 400. pl. 525. Poph. 99. Saer and Hardies Case is determined notwithstanding the act of God, and this appears by the words of the Statute that no lease shall endure longer than, &c. and by the intent the lease determins with the Non-residence, else the ends of the Statute of Hospitality repairs and Cure of Souls would be frustrate, and the successor is not obliged to residence by this Statute but only the lessor; also the clause of Pluralities expounds the other being in the same words, and lease by Curate would not continue after his death, else the Church would remain without Cure, and the Statute never considered the interest of the lessee but left the lessor to determine it at pleasure; as to the objection that then 14 Eliz cap. 11. would be of little force: Its answered in that such Parsons or Vicars as have no Cure may lease, but not such as have Cure, and Moor pl. and Mot and Hales Case, 3 Cr. 123. pl. are expressly thus, and the Cases 6 Co. 21. are on 21 H. 8. cap. 10. that give penalty for Non-residence which cannot be after parties death, but here its void. But 2. admitting it good yet its void for the reservations being not reserved yearly, but at such terms, viz. quarterly, or so many days after, 6 Co. 38. this may be (15)

turned into yearly payments, and thus M. 2 & 3 Eliz. Dyer 123. pl. being payable after the year is void: also here is not the ancient rent for each parcel, there being not six shillings but only one shilling for one part, 1 Inst. 44. its said a Person may severally lease, but 5 Co. 5. is contrary, yet it may be with several reservations, as the Vicar seised of ten acres at 10l. per Annum, leases nine Acres for 9 l. and 1 l. for the other, here are several remedies, therefore though the sum be the same the rent is different. 3. And chiefly this lease to begin at a day to come while another is in being is not warranted by 13 Eliz. cap. 20. for twenty one years, there may be concurrent leases on 1 Anders. 65. but yet this lease is to begin from Mich. next, being made 11 Septemb. and the Statute is to begin from the making and is a disabling Statute, and 14 Eliz. cap. hath an express clause, that no lease by that Statute shall be in reversion, and this is so in common speech and Intendment of Law, M. 2 & 3 Ph. & Mar. Dyer 125. pl. on the Statute, 7 H. 8. cap. it appears lease by the Kings surveyor to begin in futuro, was held a lease in reversion, and a concurrent lease cannot be made, 1 Inst. 45. on this Statute, though Bishop, and Dean, and Chapter, may on 13 Eliz. make concurrent leases, and 18 Eliz. cap. takes notice of the inconveniences of the concurrent leases, and therefore had more reason to provide against leases on 14 Eliz. cap. than on 13 Eliz. and this shews the practise was not so, and Poph. 8. the lease by Magdalen Colledge to Standish is imperfect, on which lease the question depended, but the question was on a second lease to Standish, and a third lease to Cary, the first lease being expired, its resolved the first lease was surrendred by taking the second lease, but whither a second lease for twenty years be good during a former of twenty years is but only Pophams opinion, and this question needed not if the first were surrendred by taking the second.

Serjant Hardres for the Defendant made only two points, 1. That the lease is not void by the death of the encumbent, which at Common Law is plain, 1 Inst. 44. & 343. and Dyer 521. e pl. and this liberty is not restrained by 13 Eliz. cap. 10. & 20. nor is the present lease void by death being no absence within this act which is intended voluntary, as 6 Co. 21. Butler and Goodales Case; also the Statute intends an absence that hath power of return which death is not as Lambs Case, 5 Co. 21. and Perkins Sect. also the Act intends an absence punishable; also the lease for three lives or twenty one years or for forty years cannot be intended to determine by the death of the Encumbents; also 14 Eliz. cap. was

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to incourage habitation which would be frustrate if death determine it, and they cannot be said to be absent that are not in esse; also death is voidance in fact, but absence only as a penalty, and if death dissolved leases, 14 Eliz. cap. would in vain let loose, 13 Eliz. cap. 10. tortura legum pessima whence 5 Co. 18. & 10 Co. 105. Denbauds Case, Mott and Hales Case is various and uncertain, and Moor 448. pl. 609. Robins against Gerrard and Prince encumbent, absent by Inhibition of the Ordinary shall not void his lease, and 1 Inst. 45. b implies that if according to the Statute the lease is good after his death. As to the second point on 14 Eliz. cap.

this is only a future interest not a lease in reversion, which 1 Inst. 345. b differs in pleading, and in point of grant the one is virtute cujus he is possessed of interesse which cannot 36 H. 6. 18. be actually surrendred, 15 H. 7. 14. and Lit. 270. Com 147. but lease of reversion may or release &c. and Com 155. & 156. & 159. Com 418. the like difference betwéen lease of reversion and in reversion; also a future lease is not within the mischief of a lease of the reversion which prevents waste, as 1 Inst. 54. and the Statute intended to preserve the same remedy for the successor as for the lessor, Poph. 9. and notwithstanding future lease Com 421. hinders not debt by lessor for the first rent; also 14 Eliz. 11. restrains not the lease to the making which is that makes the doubt in Dyer 246. pl. also the intent of this Law appears by the Proviso, that it be not for above forty years, and the lease in question is only for twenty years during the lease for three years, and if the former Statutes will endure a concurrent lease much more will this that is enlarging, also such an Executory estate 5 Co. 125. Saffins Case, and 1 Inst. 46. b & 270. & 3 Cr. Bruerton and 3 Co. Rawlins Case, shall pay no rent till possession begins; also the end of the Act being for habitation must be expounded liberally to that end, 3 Cr. 364. Hunt and Singletons Case had two leases in being which excéded forty years; also this would overthrough all concurrent leases which are as much in reversion as that, also 5 Co. 2. Elmers Case, and Moor 253. pl. there were two present estates in interest which are not in this Case, also this being for years there is remedy by debt, also here néeds no attornment and so not within the same reason there being above forty years, here lessée as Poph. 9. Thomson and Trafords Case.

Hales Chief Justice said, this lease cannot be avoided by 13 Eliz. cap. 20. there being no reason for this in regard another succéeds and may provide for the Cure, and this would overthrough many Cases, and Mott and Hales Case was so ad-

adjudged, but Robins Case is contrary, and so the matter is set at large now; also 3 Cr. 11. its admitted that the lease continues, and else the provision to make leases for three lives good would be by this overthrown; also a Parsons lease is as good against him without confirmation as against others with; 2. As to the reservation though on 13 Eliz. cap. 10. it must be yearly, yet on 14 Eliz. cap. 11. Dyer 425. its accustomed rent, and if it were yearly yet twenty days after is for the successors advantage and so is good enough or else shall be rejected; but the chief question is whither a lease in futuro being for less than forty years be void, as its agreed the lease for forty years in futuro is, also whether a concurrent lease for forty years or under be good or not, and in C. B. the lease for twenty years of a house in a Corporation leased for nineteen years, the second lessee surrendred and took a new lease for forty years to begin presently was adjudged void by reason of the first lease of twenty years in being, and yet this was but by Estople or in futuro for residue of years, but perhaps 18 Eliz. cap. that prohibits concurrent leases doth not extend to 14 Eliz. cap. 11. which is a substantive act by putting the leases out of 13 Eliz. cap. 10. and the Statute 18 Eliz. recites only the Statute 13 Eliz. cap. 10. not this Statute 14 Eliz. and therefore unless it were enabling to make concurrent leases, as Hub. Crane and Taylor saith it is not, this lease cannot be made good, which the Court agreed, and that concurrent lease for lives by the Bishop were made void being confirmed by the Dean and Chapter because it passeth the reversion, but for years is good; for Bishops are not within 13 Eliz. cap. 18. of Ecclesiastical persons, but were it res integra it might be questioned, yet now concurrent leases are not to be shaken; also there hath been good opinion againg Butler and Goodales Case. Sed adjornatur.

Whaley *and* Tankard. Ante.

(16) HALES Chief Justice strongly conceived in this case, that lessee for years shall have new five years after the term, because as an Assize lieth here, so entry in casu proviso lieth where tenant for life levies a fine, but on a disseisin aperto Marte there may be a difference; but Twisden Justice held this all one with Farmors Case. Also by this limitation by Covenant to stand seised by lessee for ninety nine years if he so long live, and after his death to the Covenantees, no use riseth to them, but this is a good remainder as Lord Darbies, but being to Edmund for ninety nine years, and after that term to the

lib. 3. cap. so Bract. 99. and Grotius lib. 2. cap. 10. § 13. de Jure Belli, whose office is meerly gratuitous. 2. As of publick profession, as he hath privilege so he hath trust and obligation, which is the reason the Civil Law hold them stricklier to it, Pecchius 36. as an Inn-keeper Caupones, Nautæ & Tabularii, Hub. 18. & 1 Cr. Kneelands Case, and that the Defendant is but a servant doth not appear by his receiving salary. For 3. he is Master of a Ship and a Judicial Officer of universal note, Loxennius lib. 2. cap. he hath care of the whole Ship, and by the Laws of Oleron may pawn the Ship, as Hub. 2. Bridgmans Case, which is more than an ordinary servant; also he transacts all without notice of the Owners, especially where there is no Charter Party, as here Pecchius 126. ad magistrum respiciunt contrahentes; that against the Owners is dativa actio not ex contractu unius, sed Pecchius 132. the Owners are but as Fidejussors and the Master is the Principal, lex mercatoria 14. and Wellwood 87. Abridgment of Sea Laws, he hath his office by publick Law not by a private command, 2 H. 5. cap. 6. a sworn officer and may impose pecuniary or corporal punishments on mariners, as Steward of a Mannor; the Master acts officii præcepto a Procurator, but as Delegate the Merchant may charge the Owners, or 1 Inst. 385. the Master at Election or the Owners on insufficiency of the Master, quoad habitum & proprietatem, the Ship belongs to Owners, but quoad exercitium it belongs to the Master, as Cure is divided betwixt Parson and Vicar and the sallary is but as a fee, of an officer 2 Inst. 463. though 1 Inst. 233. removable at Will. 2. By the Law of Merchants the Defendant ought to be charged the 51 Rhodian Laws in Morison do include exercitores as well as the Master; them actione exercitoria, him actione Civili, the Master may by his neglect bind himself and the Owner to the Merchant, but not contrary: The second and third Law of Oleron obliges the Master to answer for neglects, Bronch. de reg. juris 58. 1 Cr. 353. of Crassa or lata culpa or de culpa levissima, and the having the usual number is not diligentia exactissima, Bronchurst de reg. juris 61.

Melloy for the Defendant fraight was by Cape Merchant generally, he that hired a dead vessel there the Owner ran no risk. 2. A Cape Merchant special which is now usual to take in by Tunnage. 3. There was an under fraighter which is the case in question with Bills of Lading, Van Luens Digest. and in both those Cases the Owners are answerable 4 on Cotton 63. there were exercitors that of themselves undertook all the first and last sort are obsolete, but the second and third

now used, and the Master is chosen but as a servant for his skill and is answerable for his neglects only, and if he be in no fault he is discharged and the Merchant shall not be in better condition against the Master than the Owners have for the Ships furniture, 9 Ed. 4. 40. and Lane 68. & 2 Cr. 266. also the Statute 32 H. 8. cap. 4. that gives the Admiral concurrent jurisdiction herein shews the delivery special in this case, therefore called Merchant adventurers, and the Master cannot be presumed to keep the Marchants goods safer than his own: 2 Bulstr. 209. Kell 77. & Doctor and Student 38. also the Master hath no benefit by this delivery 4 Co. 48. and Dyer 239 pl. therefore he that hath the benefit shall answer which is the Owners, 18 H. 6. 25. in 4 Inst. 146. Digest. de exercitoria actione L. 1. § 3. Registre 100. and Wornale and Bradshaws Case, 9 Jac. there is election by the Marine Law on wilful neglect not else: also the Ship is instead of the Owners 1 Roll 530. and therefore is answerable, 2 Ric. 3. 2. Stat. 54. taking alters the property, spoiled by alien A. in the FNB. 114. Regist. 129. for which Letters of Mart are given: also Piracy 13 Jac. Bellinghams Case, though illegal shall not make the Master answerable, but for spoliatio in navi, he shall answer as Grotius Digest. de famosis libellis. and by the Laws of Oleron cap. 5. Clyraks Coment in French in Lyncons Inn Library, Tr. 24. Ed. 3. tit. Bristol num. 45. in Pryns Records the Master is not answerable for Goods stoln out of the Ship moored at Anchor in Pool where there is a sufficient number of men, Digest. 33. 1 Roll. 560. Ferns and Smyth, but only for his own faults. 2. This is not like a common Hoyman with small vessels are common carriers and so accounted, 27 Ed. 3. cap. 15. but not Ships, so Pasch. 13 Ed. 4. 19. and 1 Roll. 536. there is the like difference, Hill. 19 Car. II. in Exchequer in quo Warranto against the City of London for Water Bailage, it was resolved the duty was not due of great Ships that come from forein parts, but only of smaller vessels, and these have remedy against the County as other Travellors, 22 Ass. Davis in the Case of the Bank but not the others being 4 Inst. 147. floating Castles and none can enter into them for their safety nor can the Hundred take notice of their robery, 7 Co. 7. Sandals Case, nor assist with Naval provisions, and this will discourage Navigation and is without president or practise, but the Master always discharged the Court agreed the Master shall not answer for inevitable damage nor the Owners neither without special undertaking, when its vis cui resisti non potest, but for Robery the usual number to guide the Ship must be

Increas-

increased as the charge increaseth, and the Master is not a meer servant, for fraight is the mother of wages and one lost with the other, therefore this is money paid by the Merchant, and the Court inclined strongly for the Plaintiff. Post.

Metnem *against the Hundred of* Thistleworth.

(22) Fresh Suit.

ACtion upon the Statute, the Defendant pleaded specially they made Hue and Cry and took Dudley one that Robed, and within forty days he was in presence of a Justice and charged with the Robery, and the Justice undertook to produce him next Sessions, and he was in the Sessions-House and indicted, but it appeared not on this special Verdict. North Solicitor prayed Judgment for the Plaintiff, that this is no sufficient taking within the Statute of Winch. 1 & 27 Eliz. cap. 13. is but excusive and abridging therefore must be taken strictly and this taking was but accidental by one of the Hundred that charged him, and not ex recenti prosecutione, nor was he arrested, and the issue being on an actual taking, a legal taking is not sufficient.

Saunders contrary for the Defendant, the answering the body is not to the party but to Justice, and so the Statute of Winchester is expounded, and on 27 Eliz. its not a bare taking unless the party be brought before a Magistrate, and Goldlb. 55 pl. indicting one before in Prison was a taking within the Statute, 3 Ed. 3. Coron. 337. 3 Inst. 139. also Sir Joseph Ash though a Justice was one of the Hundred, Crompton 68. & per Curiam, this is a sufficient taking as discovery in Court of a felon, though the Court bail or discharge him, and Judgment for the Defendant.

Coker *and* Child. Trin. 24 *Car.* II. Rot. 663.

(23) Deeds.

DEbt on a Charter Party, quod per Indenturam testatum existit, that a Merchant covenants to pay so much to Bexby between whom as Owner and Child Merchant the Indenture was, and so much to the Plaintiff as Master, the Defendant pleaded that the Plaintiff was no party to the Indenture, to which the Plaintiff demurred, & per Curiam, any one mentioned therein is party enough to sue this Indenture being not between A. and B. but hæc Indentura testatur, which is all one with a Deed in the first person, I give so much to one and so much to another: also in the later Indenture a Letter of Attorny or an Interest may pass to a third person,

8 Ed. 2. Assise. And Judgment for the Plaintiff. 2 Inst. 673, 3 Cr. 5.

Crosse *and* Corke *Administrator of* Redman. Trin. 24 *Car.* II. Rot. 1425.

(24) Executors.

IN debt on obligation, the Defendant pleaded that Redman and John Crosse were joint and severally obliged to the Plaintiff that made Robert Crosse the Plaintiff Executor, who hath administred diversa bona (but not to the value of the debt) both of Richard and John, to which the Plaintiff demurred, and by Saunders for the Defendant, 2 H. 4. 21 & 11 H. 4. 33 Com. 184. & 20 Ed. 4. 17. and in Hill. 21 Ed. 43. and Athly and Child Stiles 384. when Executor doth administer any part the duty is gone. Symson for the Plaintiff agrée that the Creditor made Executor of no assets is satisfied, but where a third person joyntly bound with the debtor may be sued there, he must be plenarily satisfied, & per Curiam, though this be one debt they are several obligations and there must be one satisfaction, else the action not being suspended its not sufficient and here is no satisfaction, because no assets appear to the value of the debt to retain, and here might be a Judgment against which he cannot retain, and 12 H. 4. 21. Judgment for the Plaintiff. Nisi.

Blacket *and* Lumley. *Wednesday*, January 29.

(25) Common.

IN Replevin in A. the Defendant avowed for Damage feasant, the Plaintiff by replication claims Common to a messuage in Fallofield, not said Infra Juirsdict' Curiæ & venire facias, on traverse of Common was of A. and F. infra Jurisd' which by Hale Chief Justice is ill and error, though if the Defendant plead a plée without place, the Plaintiff may for his expedition take issue and alledge a place, but though he doth not this is out of Jurisdiction and so void, but by Wild this is well enough being of one of the places from which it should come. Twisden agreed with Hales, because an inferior Court cannot enquire dehors as in the Case of Hull Bridge also the venire facias was & quia nec for qui nec, which by Twisden is error, as Edw. Wars Case of Canterbury Scire for Sciri facias, but Wild held this well enough. Hales Chief Justice doubted, but Wild held the venire facias præceptum est per Seneschallum, not said per Curiam is ill, but Hales and Twisden on the contrary, being ad eandem

dem Curiam, but each holding one error, Judgment reversed, Nisi.

Frogat *and* Munday.

(26) Sheriffs.

HALES Chief Justice said that warrant directed Ballivo hundredi is executed as a Sheriffs Bailly though in a liberty, and bond must be taken in the Sheriffs name, 1 H. 6. 6. and so is the Peak, but it must be Ballivo libertatis, and then anciently bonds were in Sheriffs name, not so now.

Countess of Falmouth *and*

(27) Amendments.

OBligation dated 21 of March 1670. An. 22 Car. II. to perform covenants in Indenture bearing date with these presents which indeed was 21 March 1670. An. 23 Car. II. Saunders prayed that the obligation may be made to accord with the Indenture. Hales Chief Justice on Oyer it may be made to agree with averment there was no other Indenture & per Curiam he had leave to amend.

Dominus Rex *and* Thode. Ante.

(28) Conspiracy.

HALES Chief Justice conceived quod conspiraverunt is well enough as to one, if the other 18 Ed. 41. 24 Ed. 3. 4. dye or stand out proces, 14 H. 6. 25. and though the others do after come in and be acquitted, the party convict shall never have advantage thereof, which the Court agreed and Judgment, pro Rege.

Do *and* Permiter.

(29) Exicution.

IN Trespass the Defendant justifies by levari facias awarded by Steward and sealed by him in a Hundred Court held before the Steward and Suitors, & per Curiam, the sealing of proces by the Steward is sufficient, but the Court being said coram Seneschallo & sectatoribus its ill, and Judgment for the Plaintiff on demurrer, but coram sectator' per B. Seneſch.

Skinner

Skinner *and* Gunton.

(30) Conspiracy. IN placito transg' quod conspiraverunt or indictari procuraverunt, if Trespass be the principal and this but for agravation of damages finding one guilty is sufficient, but in a bare conspiracy not, though no villanous Judgment be given ex motione Sanders for Imparl' bringing mony into Court.

Sir George Narberow *and* Ousley. *Friday*, January 31.

(31) Prohibition. SIR William Jones prayed a Prohibition to Chester on Bill to have remedy for a rent proved to be paid by the occupiers and to discover counterparts of writings, the Defendant denies all writings and payment of rent by him, whereon is process and trial, and after a decree for the rent & per Curiam, Chancery cannot decree a rent but an assise lieth at Common Law, and so by Twisden it was held within these two years in Chancery here, but they may decree lands to be set out liable to the rent, and a prohibition was granted, Nisi.

Porter *and* Sterling.

(32) Fees. IN an Assumpsit for mony laid out as Solicitor, and for fees by Attorny of B. R. the Defendant pleads 3 Jac. cap. and that no copy of Bill of fees was delivered, to which the Plaintiff demurred, and by Twisden and Wild an Attorny in B. R. may be Solicitor any where, therefore must shew where laid out, but by Hales Chief Justice in an Assumpsit as a Solicitor it must be shewed, but an Attorney is intended only to Solicit in his own Court, but the Plaintiff by replication may shew it as Plaintiff must reply that there were perils of the Sea and its sufficient for the Marchant to say the Ship was lost; also this consideration being intire being a Bar for part, the Attornies fees its Bar of all, but its but a temporary Bar, the debt being confess, and on new delivery of Bill fees must be paid per Curiam, as on plene administravit assets discended after is cause of new Suit, and Judgment for the Defendant.

Thomas

Thomas *and* Sorrell. *Saturday*, February 1. Ante.

IN Exchequer Chamber Finch Attorney General, for the Plaintiff in an Information for selling Wine by retail without license considered. 1. What the Common Law was before 7 Ed. 6. both sides have agreed that every man that would might set up a Tavern, but its likewise by old Mag. Chart. 115. the Statute called Judicium Collistrigiæ, and by old Mag. Chart. 115. plain that the disorders were great, and 27 Ass. 44. therefore made an Article in the Iter, and they forfeited the Taverns thereby, as old Mag. Chart. 24. and as Taverns increase, 4 Ed. 3. cap. 12. the mischiefs increased, against which that Statute and many others, 5 Rich. 2. cap. 4. & 3 Hen. 8. cap. 8. & 23 Hen. 8. cap. 7. 28 Hen. 8. cap. 14. and by 18 E. 2 the haunters are enquired after, and the Statute 7 Ed. 6. cap. was made to prevent such disorders which 2 doth regulate the abuses in price and inferior persons keeping Wine, and that none retail but Market Towns, and then if not corporate to be licensed by Justices, if corporate by the Mayor all revocable, and the number regulated, and penalty set on such as license beyond the number, and such busie reformation implies great disorder before and the remedy must be suitable. 3. As to the Patent to the Vintners 9 Jac. it is too general, because the Corporation may make any free and so a numberless number of Taverns may be by every freeman, and the Proviso to regulate according to the Statute would not aid Stepney the place in question; also there can be no restraint of Taverns in suspitious places and corners; also freemans license would be irrevocable, and another ill consequence is that the Vintners hereby gain an hereditary power for ever to dispence, and where such consequences are inseparable the Kings grant is void, as his grant to a Villain shall be no enfranchisement, so 5 Co. Knights Case, the Kings grant of reversion would be void, unless the rent were apportioned Hill. 1651. Cremnor and Burnets Case, the grant was held good only because it hindred not the custom to devise, so 21 Ed. 4. 47. exemption of too many makes it void for obstructing the publick Service. 2. This Patent is rather abrogatio legis than relaxatio Juris, rather a downright repeal than a dispensation with 7 Ed. 6. which are done necessitate or utilitate pensata to particulet persons, and then this is a natural power entrusted in the King, but a dispensation thus in grosse cannot be intended done on consideration of circumstances, and therefore is against the reason (33) Wine.

reason of the Prerogative intrusted in the King for consideration of time, place and person, but dispensatio quæ tollit legem peccat in the very regula Juris Gubernatricis, and the Kings Patents Br. 100. 15 Jac. Stidsons Case, 2 Roll.201. & cannot exempt one particular Jurisdiction and give it to another, much less exempt from the Law. 3. This Patent includes a delegation of the regal power though not so called, but only a power to make free, dispensations of mercy are insignia regni, incommunicable and there is no end of it, for as a subject may dispence with one he may dispence with the rest, and so the Prerogative, Co. Entr. 370. which was indeed the Case, 7 Co. 36. the Case of penal Laws would come into private subjects hands, and the power is more mischievous in the hands of a Corporation then in a particular person, because hereby an office of dispensation might be erected, Hub. 183. Davis and Barkers Case, Corporation cannot have grant of a penal Law by Charter because it includes a power to dispence, and in the Case at Bar there is the same power under another name, as were the Patent, that such as they named under their Common seal should sell, this is void as Sir Walter Raulies Case; also had the Patent given power that all free of Vintners should be Denizens it would be void, and 5 Ed 6. cap. had done the same to Ale houses, as 7 Ed. 6. did to Taverns, and why should freedom change the Case, that rather increaseth the mischief and doth but disguise the ends of the projectors, and there are no footsteps of this kind in our Law, that of 2 H. 6. cap. was a Law for the Kings profit and inheritance, this is a part of his trust, this is not making a Mayor Justice which is a less power then he had before, but this Patent repeals the Law in eight parts of ten in the Kingdom, and therefore the Patent was not good. But 2. if it were its gone by the Kings demise, the Successor being as absolute as his Predecessor in the Soverainty and cannot be disherited by him; also its not possible for Predecessors to Judge of those Cases that may happen in time of the Successor; also every offence is contra pacem Domini Regis nunc, and the Predecessor cannot dispence with future breaches; also there is difference betwæn Laws of profit and inheritance and dispensation with Laws of publick government which cannot stand; also from like Cases 1 Cro. 1. Molineux Case, Latch. 58. a protection ceaseth by death, 1 H. 7. 25.b. Grant of Sanctuary binds not Successor, 1 Rich. 3. 4. and Dyer 165 pl. the office of a Judges grant for life ceaseth by death; also the Case of Waterford doth not resemble this being not only for Inheritance, but because this point of dispensation

ſation could not come in queſtion, 7 Co. 36. this is a perſonal truſt, and therefore as Commiſſion of Sewers 4 Car. I. Thurſby and Warner ceaſeth by his death; alſo this power is rather an authority then an intereſt and being not derived out of an intereſt in the King cannot be an intereſt in the ſubject by being grant for life, years or inheritance, 15 Jac. Bridgman 113. Allen and Newton were for this reaſon in doubt if license were aſſignable, and Hill. 4 Jac. Rot. 128. Shaw a license to tranſport Sheepskins was adjudged not aſſignable neither is it a liberty but a pardon, and 11 Co. the Caſe of Monoplies was held void as well for the prejudice to the Succeſſor as to the people, this was Lord Cooks reaſon given to the King and Counſel on Commiſſion to enquire into that Caſe as againſt the Prerogative. 3. The Proviſo is not enacting as that of St. Albans but ſaving of that which was lawfully uſed, and ſuch the Company may enjoy and yet be puniſht by 12 Car. II. cap. for the Corporation were only freed from the penalty of 7 Ed. 6. and the King may elect on which Statute he will proceed, and by proceeding on the later he infringes no priviledge ſaved from a former Statute, as here alſo the verdict is imperfect, the ſaving in 7 Ed. 6. being to the politick capacity of Corporations not to the particular members, and its only of liberties uſed not of what was claimed, and theſe are not found to be uſed by the Corporation as it was expreſly in the Caſe between Thomas and Walter, and this being a matter favourable omnis poteſtas diſpenſandi duplici titulo eſt odioſa, by monopolizing power to license by Patent without example, and for theſe reaſons he prayed Judgment for the King who is hereby attached in a point of his Soveraignty. Hales Chief Juſtice took no regard to the imperfection of the verdict but ſaid the main ſtreſs of the cauſe depended on the firſt great point, but the other ſide not attending it was adjorned till Saturday next.

Earl of Pembrooke *and* Weſtall. *Tueſday*, Feb. 4.

IN Treſpaſs of breaking of his Net, the Defendant pleaded not guilty, and evidence is for a Piſcary. Winington prayed full coſts on 23 Car. II. cap. 9. § 149. but Iſſue being not guilty and no title in the Declaration nor certified by the Judge of aſſiſe that title was in queſtion. The Court refuſed to give more coſts then damages. (34) Coſts.

Carpenter *and* Smith. Ante.

(35) Estates.

IN an ejectment of demise of Pargitor, special verdict not guilty as to moety, as to residue that Jane Capell was seised for life the reversion to Will. who had John his son and heir and Francis lessor of the Plaintiff, Will. levies a fine to use of himself for life and Jane, and after Janes life to J. and his heirs, and in case J. dye in life of Will. then after death of W. Jane, &c. it shall go to the next heir of Will. in fee, Will. after leased to several, J. released to them and that Francis is heir to John, and William Symson for the Plaintiff, 1. That here being a fee simple to John, the limitation over on his death is void, and on Lit. 22. the right heirs of William are in by discent, or however on 1 Co. Archers Case, 1 Co. 42. this is but discriptio personæ and this obtained first in devises Hut. Angers Case with difficulty, and 1 Roll. 794. in Copyhold its held ill, but 1 Cr. Steward and the Earl of Kents Case, there be no limitation of the use back to William, but remaining in abeyance in the conusees till the contingent happen, and so William having no estate his barge and sale operates nothing. 2. Admitting William had power to disturb, yet here is no necessity for the Conusees to enter to devest the contingent use to the Plaintiff being not disturbed, release by tenant for life to his Bargainee doth not devest or discontinue as grant of totum statum by tenant in tailwith release after 2 Cr. Winstons Case, 3 Cr. 854. the estate was bound by the first Covenant of Marriage and not destroyed by lease or grant of the reversion, and here is no use found by the verdict to be any where, therefore as on recoveries coming in without consideration they are seised to the first uses.

Saunders for the Defendant. William seised of part in fee and of part in reversion after death of Jane, covenants to levy fine to the use of himself Jane and Mary, reversion to John in fee, and of the lands in reversion to John and his heirs after the death of Jane, but if John dye in the life of Will. then to the heirs of John, John did dye in the life of William, then Mary and Jane died, then William least and releast being in actual possession, and Lit. 22. 119. the ancester taking for life the heir is in by discent in fee, contra if it were a less estate to the heir of such heir, Dyer 124. pl. and Hub. Counden and Clerke, but by Hale Chief Justice on 1 Co. Shelleyes Case to the heirs of the heir is in by purchase, and so is 1 Co. Archers Case; also the words though on condition as in Lady Newports Case is but a limitation Saunders on Moor 284 pl. Fenwicke and Milford, Moor

719. Countess Bedfords Case held no use being found for life of William, its in feoffees and on 1 Cr. Wig and Villars is destroyed by making lease and release for valuable consideration to the trustees and not revived by entry of cousin to eject the lessee. Hales Chief Justice, that limitation to Mary for life is to William for life, remainder to Mary, remainder to John in fee on condition that if he dye in the life of William that it be to the heirs of William, this is a limitation to John which determines if John dye in the life of William, for though fee cannot be limited upon a fee yet when the contingent is within a life or two its well enough to support a Riding contingent estate, as 2 Cr. 590. Pell and Browns Case, this is not as a limitation to a man and his heir which is fee, or to a man and the heir male of his body which is tail, but where its to the heir and the heirs of the body of such heir he is a purchasor, and when John is dead in the life of William the fee being in William is subject to this contingent which will take if nothing were done by William, but when he confounds both estates by lease and release by fine or without, this destroys the contingent or by surrender of the estate for life, the remainder is gone having no particular estate to support it, but for that which is limited to Jane for life, &c. if the first point be against the Plaintiff he can have no Judgment on this the lands being not distinguished, and as to this the use after death of Jane and William to John in fee, and if he dye in life of William to the heir of William, both sides agree an estate for life raised to William by this limitation, and so both points come to be the same of the contingent remainder to John, but if it be not so but by contingent use substantive its not destroyed, yet being not distinguished no Judgment can be for the Plaintiff, which the Court agreed, and for 1 Cr. Wig and Villars Case, the design of destroying the uses by grant of the reversion and by after making a feoffment, yet held the mean remainder after the death of the wife supported the contingent use. Sed adjornatur.

Gravenor *against* Sykes *and* Goulston, *on suggestion put into Court on Monday*, 27 Jan.

(46) Administrators.

KEble moved for a Prohibition to the Arches on an appeal by the Plaintiff there grounded on a repeal of Administration committed to the Plaintiff as Son of John Gravenor who died Intestate in the Archdeaconry of Colchester, and committing new Letters to the Defendants as

Daughters of the said Intestate, because the Ordinary had executed his power by 21 H. 8. cap. which King opposed, because by their later administration it appeared the repeal was for being granted within the fifteen days, and also for not appearing on summons to put in security for distribution for the first cause, he said a Prohibition was heretofore denied in the Case of Wiseman and Edwards in C. B. and in Hughs and Hughs Case in C. B. a Prohibition was denied upon the later, and 1 Anders. 303 pl. 313. it was agreed that the Ordinary may revoke at pleasure, and so per Curiam, he might at Common Law, but since the Statute he cannot in equali gradu, but for cause, and by Twisden want of security is no cause against a Prohibition: Sed adjornatur to see the Acts of the Court.

Cole *and* Levingston. *Wednesday*, Feb. 15. Ante.

(37) Partition. Judgment was of a fifth part in five dividenda, and for a seventh part of a fifth, and for two third parts of four seventh parts of a fifth part, ex motione Sir William Jones.

Segar *and* Broom. Ante.

(38) Bayl. In Scire facias against Bail on Judgment in debt on Dyer of Judgment, the Defendant demurred, because the Scire facias is of Judgment on Bill in Michaelmas Term, whereas the Bail appears to be in Hillary Term, but the Bill being against the Defendant as in Custodia Bail may be at any time, and heretofore the Bail was never put in before appearance as now used, but after for deliverance of the prisoner, and Judgment for the Plaintiff, but in C. B. Bail is precedent to the original on Habeas Corpus, and is conditional to appear to the original within two Terms.

Evesq; London *and* Rowe.

(39) Copyhold. The Court declared opinion that the grant of Waste by copy is void, unless so grant time out of mind; also were it good it would not bind the Successor, but on grant of a rood upon the square only a quarter passeth of an acre, not three acres or a rood every way which is ten acres, nor to be supplied by averment; also nothing passeth to the grantee till it be set out, and Judgment for the Plaintiff. Nisi.

Kirle

Jersferson *versus* Danson *and* Orpword. Ante. *Thursday*, February 6.

Judgment was de tenementis prædictis for the Plaintiff quoad Dawson, and for the other Defendant against the Plaintiff de tenementis prædictis, both pleading to the whole in Scire facias as tertenants, and no Judgment de medietate as it would be, had they pleaded severally to parcels, which the Court agreed well notwithstanding the former opinion. (52) Joyntenements.

Bipus *and* Milford.

Special verdict found, M. seised and had Issue Robert and Ralph two Sons by several venters, and covenants to stand seised to the heirs males of his body begotten or to be begotten of the last wife, afterwards Mich. died and Robert the eldest son entred and covenanted to levy a fine, and then died without issue, then Mary in remainder in tail married Gray lessor of the Plaintiff, Mich. had issue Ralph the Defendant by a second wife, and if any use arise by this Covenant to the Defendant then for the Defendant. (53) Uses.

Jones for the Plaintiff, that no use riseth by this Covenant. 1. Not to begin after the death of the Covenantor. 2. By implication to the Covenantor no use riseth; a future use may be, but not such a future use that can by no possibility begin till death of the Covenantor, because the heir cannot be obliged where the ancestor is not, 21 H. 7. 18 pl. b and Dyer 55 pl. that the heir should have use after death of Ancester though all persons were obliged to stand seised to that use is void, and Hub. 313. Ribbat and Lee is express that a use cannot arise after a mans death nor his heir stand seised. 2. This doth not enure as a present estate tail by implication to the Covenantor for life, because the Covenantor would have expressed this as Covenant to the use of A. after the death of B. a stranger gives no estate to B. and its all one to the heir, for this would do a wrong to the Covenantor, and 1 Co. 129. Chudleys Case is but a saying by Counsel, and Mich. 20 Jac in C. B. Winch' 61. Symons and Buckley is expresse against this, that Covenant to use of his heir gives no estate to the Covenantor, and 1 Inst. 22. b Milfords Case is for necessity, there being no limitation but to the heir, but here the intent is that the estate should not change till then; also this limitation to his heir, Hub. 30 & 31. cannot by use or any conveyance

make the heir a purchasor, and were this good as an implied estate its against the Plaintiff, the verdict concluding that if any use ariſes to the heir, then for the Defendant, &c. which must be intended by future use or by purchase.

Levins for the Defendant, had the verdict bin general there being no devise nor entry found, it would be against the Plaintiff, but on this ſpecial concluſion an uſe doth ariſe by implication to the Covenantor, as 1 Co. 154. Lord Pagets Caſe, 1 Anderſ. pl. 270. who by implication took for life, which was forfeit by his attainder contrary to his limitation, and Moor 437. & 1 Anderſ. 297. Fenwicke and Mtifords Caſe, 1 Inſt. 22. is on leſs reaſon then this without which there can be no conveyance, and 1 Leonard. 102 pl. Allen and Palmer is doubted, but 1 Leonard. 256 pl. deviſe to right heirs after death of wife and ſon, gave eſtate to the wife, and uſes often ſtand on implication, 2 Leonard. 216. and this ſhall purſue the intent of the party, being originally but a thing of conſcience, 1 Anderſ. pl. 258. alſo here is a Proviſo that on payment of 1200 l. by Robert the eldeſt Brother to the younger Children the deed ſhould be void, and that it ſhould be to no other uſe within the feoffment; to the uſe of I. S. for life and to no other uſe, theſe words are void, for ſome body muſt have it and that is the feoffor, as 1 Inſt. 23. and if here be no implication, yet 2. its Good as a future uſe new ſpringing, for this is not a bare perſonal contract but a clog and lien upon the eſtate, 2 Roll. 788. §, 1. is on the ſame difference; alſo this is void for an Action of Covenant and inures as contingent uſe, 1 Co. 155. b as an Executory deviſe the freehold always remaining in the Covenantor ſubject to this uſe, and 1 Co. 154. b there needs no particular eſtate to ſupport it; alſo that Covenantor ſhall immediately ſtand ſeiſed to the uſe of his heirs refers to the clauſe, that it be to no other uſe meſne, 3 Co. Butler and Bakers Caſe, Poph.

Hales Chief Juſtice, whether the heir take by diſcent or purchaſe its within the concluſion of the verdict; alſo a covenant that land ſhall be to ſuch uſes after his death doth preſtly change the uſe, and the land is really bound hereby in intereſt, elſe moſt jointures that after death of husband rent ſhall be paid to the wife would be ſhaken, which would elſe be void, and nothing more ordinary then ſuch uſes, therefore good enough, and Dyer 55. is void for the incertainty only, but this is a poſitive agreement and charge that ſevers the uſe from the land, but its doubtful whither the heir here be capable to take by purchaſe, on 1 Co. Shellies Caſe being not full heir, and this being

being by way of Remainder will else be void, as Hub. 31. Counden and Clerks Case, in Lord Cobhams Case, a limitation to the heirs of the body taking by purchase was by the Act of Parliament setting up the Will of the person attaint, adjudged in quasi by discent. Sed adjornatur.

Winston *and* Pinkney. Ante.

(54) Rents.

TEnant for life leaseth for years, the termor assigns the whole term rendring rent to the lessor which by Deed was agreed good, and in Mansfields Case it was adjudged, debt lieth for such rent without Deed, and Robins Case, 12 H. 4. 17. in 2 Roll. 448. & 9 H. 6. 43. & Hul. Peto and Pembertons Case, and Dyer 251 pl. 92. are of fee or freeholds, but on surrender of term a rent may be reserved without any deed, so 2 Roll. 497. and Mich. 23 Car. I. Bachurst and Aren lessee for years assigns his term, debt lieth without deed being an Executory contract & quasi real, but it was doubt whither debt lay before the last day; also this is no actual surrender but by construction of Law that drowns the lease, and its agreed that lessee for years may anex a condition to surrender and he may as well reserve rent, but lessee for life must surrender on condition by deed or reserve a rent. 2. The lease for life is pleaded by Indenture, not said hic in Curia prolat which is ill and not aided by general demurrer. Judgment for the Plaintiff, but per Curiam. Were it a bare and actual surrender expresly by Parol a rent could not be reserved, but this is but an Executory agreement which is sufficient for debt.

Gravenor *versus* Sykes *and* Goulston. *Friday*, Feb. 7.

(55) Administratiō.

KEble ut ante 294 pl. 36. prayed prohibition to the Arches, suggesting that the later end of September last John Gravenor died intestate, that in October Jeremiah his son took letters of Administration and put in security by himself and two sureties of 1000 l. that afterwards 9 Novemb. Sykes and Gravenor the Defendants his Sisters, two of the Daughters of the Intestate came before any Inventory exhibited for which by the Statute 22 & 23 Car. II. cap. 10. (b) there is a years time allotted and alledged in the Spiritual Court, that the parsonal estate of the Intestate was worth

several thousand pounds, and thereupon obtains a cytation to the now Plaintiff being Administrator, to appear the 18 Nov. which was the next Court day after at Keldon, this they serve the night before, viz. on 17 Nov. and the substance of this is, that unless he appear and find two sufficient sureties according to the Statute that his administration shall be repealed and committed to the Defendants at their instance and promotion, and upon 18 Novemb. the Plaintiff not appearing they proceeded to revoke his administration and grant administration to the Defendant, and from that the Plaintiff appeals and now prays a Prohibition. 1. Upon the Statute of 21 H. 8. cap. 5. because the Ordinary hath executed his power in equali gradu, and in Sir G. Sands Case, Hill. 15 & 16 Car. II. and in Trin. 18 Car. II. Offly and Best and in 1 Cr. Fotherleys Case, and so constantly almost in every age since the Statute there hath been a constant opinion for granting Prohibitions unless there do appear some evident surprise or fraud in the obtaining them, which cannot be shewed in our Case, it not appearing by either the cytation or any act of the Court that the Administration was within the fifteen days or on any surprise or fraud and so there is no color but the not sufficiency of the security to revoke, and this appears to be grounded on the false suggestion and promotion of the Defendants, alledging the personal estate greater then the security, whereas in truth its not above six or seven hundred pounds at most, and no Administrator can be safe should such repeals be allowed, for still another of kin may rise up and alledge the sum of the Intestates personal estate greater then the sum in which the administrator and his security are obliged in and so repeal it, which would quite destroy all the benefit of administration intended to the kindred: also it cannot appear till the Inventory come in what estate it will be, and therefore as in the Case of Hughs and Hughs in C. B. after the Inventory exhibited the Ordinary may cite the Administrator to distribute, and if he then refuse so to do he may repeal his Administration, if he will not give security as the Court awards. Also the express words of the late Statute are that the Ordinary shall and may upon their respective granting administration take sufficient bonds with two sureties or more with respect to the value of the estate, which being here once done he is no ways by this Act remitted to any extra-judicial power of repealing as at Common Law but must acquiesce in the security as he first accepted it, but non allocatur the Ordinary being Judge of the Security.

Curteis

Curteis *and* Uxor *and* Boorn.

IN waſt by Bar and Fem tenants for life remainder to his heirs ad exhæredationem of Bar and Fem. Saunders excepted that though tenant for life, and he that hath the inheritance may join, yet it muſt be ad exhæredationem of the reverſion in fee only, which the Court agreed and the damages muſt be according to the Diſheriſon. Sed adjornatur being after verdict on Iſſue no waſt done, and Judgment aſſigned for Error. (56) Waſt.

Moſedale *and* Midleton.

IN Covenant for Impriſonment the Defendant pleads the Statute, 23 H. 6. and alledgeth it for eaſe, the Plaintiff ſaith it was to ſave harmleſs and to be true priſoner, abſque hoc that it was for eaſe, to which the Defendant demurred, becauſe on Dyer it appeared to be alſo for fees, and on Norton and Syms Caſe, Hub. this bond or covenant for fees is void, and ſo the deed being intire is void. And by Hales Chief Juſtice, bond for fees is void being 5 s. 3 d. by the week, but bond for true impriſonment is not void prima facie without circumſtances of releaſe of former reſtraint, but bond for chamber rent is void by the Common Law, becauſe the party is contra voluntatem reſtrained and ſhall be Impriſoned till payment which the Court agreed; alſo the Statute extends to the Marſhal only for ſuch bonds as they may take virtute officii. And Twiſden held the whole Covenant void, Judgment for the Defendant, Niſi. (57) Sheriffs.

Cox *and* Matthews.

ACtion upon the Caſe for nuſance in raiſing a boyd building on a piece of ground adjoyning to the Plaintiffs houſe whereby his lights were ſtopt, to which the Defendant demurs, becauſe its not ſaid an ancient houſe ſed non allocatur, for utere tuo ut alienum non lædas, and if I have a ſtream and build a new Mill and another that hath ground above ſtops the water this hath been ruled a nuſance without ſaying it was ancient, but this is evidence, if the Defendant have not a Prior title or Co. Entr. 20. uſage to divert, and Judgment for the Plaintiff. (58) Nuſance.

Hutchinſon

Hutchinſon *and* Cooper.

(59) Scire facias.

IN Scire facias againſt Adminiſtrator quare executionem non it was excepted that there was not 15 days betwæn each, ſed non allocatur, for per Curiam 15 is ſufficient for both though there be not eight for one and ſeven for another, and Judgment for the Plaintiff.

Carpenter *and* Chicheſter.

(60) Aſſumpſit.

ERror of Aſſumpſit in C. B. to ſatisfie bond on which I. S. was in Execution and diſcharge was aſſigned in not ſhewing the bond was joint or ſeveral, ſed non allocatur, the party being in priſon no matter whether erroneouſly or not, and Judgment affirmed.

Lemarke *and* Caule.

(61) Trover.

ERror of Judgment in Plymouth in trover of two bonds entred into by ſeveral perſons, not ſaid infra juriſdict' ſed non allocatur, for the bonds being infra and the converſion infra no matter where entred into, and Judgment affirmed.

Hanſlop *and* Hales.

(62) Bankrupt.

IN an Aſſumpſit for wares ſold, the Defendant pleads that ſuch a day the Plaintiff became a Bankrupt and yet is ſo, to which the Plaintiff demurred and alledged it was not ſaid he was a Trades-man, which per Curiam ſhould be but parties, agræd to pay the money.

Legar *and* Randall.

(63) Adminiſtrators.

ACtion upon the Caſe by Adminiſtrator againſt Adminiſtrator by indebitatus, the Defendant pleads the promiſe was conjunctive by his inteſtate and I. S. and takes no traverſe but concludes & hoc paratus, &c. to which the Plaintiff demurred, being but the general Iſſue, and had the inteſtate ſurvived, the Aſſumpſit were good enough & per Curiam by the others ſurviving, its but general Iſſue in Aſſumpſit, but on obligation of 2 it muſt be alledged one is dead, ſo if collateral promiſe be to pay generally, and its pleaded that it was to be on requeſt which is but general Iſſue, and ſo almoſt

most in all Actions upon the Case, or however there must be a traverse, as where jointenancy is pleaded it must be absque hoc that he was sole seised, and thus ruled, and Judgment for the Plaintiff.

Cornwall *and* Lisset.

IN debt against the Executor for rent in his own time, in debet & detinet, laid in London, where the demise was of Lands in Oxfordshire, to which the Defendant demurred, & per Curiam its ill and should be where the land is, this being as assignée and not barely as Executor, but in the detinet only is as Executor and shall be where the demise is, and Judgment for the Defendant. Nisi. (64) Lieu.

Mors *and* Slew. *Saturday*, Feb. 8. Ante.

PER totam Curiam, by the Civil Law & lex Mercatoria, the Master is liable so long as he is within the Kings protection, and by our Law being within the body of the County, wages beginning here, and when he took in the goods he might have cautioned against them not to take them in till farther time, as Carrier that is not told what is in a box taken in, is liable for mony, &c. unless he cautions against mony; also this differs not from a Hoyman, for the Master is an Officer and not an ordinary servant but as a Goaler who is chargeable for escapes, though respondeat superior for his default, but a Turnkey is but a servant not liable; also the Owner receives Fraight in respect of this care, and whether he receives it from them or the Merchant, is not material; also though the Guard be sufficient for the Ship, yet 33 H. 6. 1. he must have sufficient Guard for the Goods, nor is this excuse of the Carrier unless in case of common enemies. And Judgment for the Plaintiff. (65) Admiral.

Twisleton *and* Godfry.

IN debt upon a Bail bond on condition to appear at the day, Winnington excepted upon 3 Cr. 800. Gibson and White that its obliging to him, not said ad tunc vicecom̃, for which cause the Defendant demurs sans oyer of the bond & per Curiam this is ill. Sed adjornatur, and its the worse as in the declaration without oyer. (66) Sheriffs.

Ravenhill

Ravenhill *and* Mole.

(67) Slander. ON discourse concerning the Indictment preferred by one, the Defendant said he did not doubt to prove the Plaintiff a cozening knave by two witnesses. Hales Chief Justice said this being of an Attorny on precedent discourse of a prosecution depending was not actionable, and so it was resolved of words spoken by Kadwallider Jones against dela Barr on discourse in Master Attorny Generals Chamber concerning deeds in controversie, which Judgment for the Plaintiff was reversed, and as Hales who gave it said justly, because they referred to matters in prosecution, which the Court agreed; but the parties were agreed.

Alston *and* Daws.

(68) Abatement. IN an Information the Defendant pleaded another depending, which was true the day of the plee pleaded, but was afterwards discontinued, and afterwards Issue joined, and the record certified that there was such a record, which per Curiam ought so to be, and so resolved in Litgolds Case but if the first were reversed by Error so it would be nul tiel record', and Judgment for the Defendant.

Peche *and* Watts.

(69) Joynder. IN Trover against the Defendant simul cum A. and B. after verdict and Judgment for the Plaintiff, Error was assigned that the Plaintiff had entred a nolle prosequi as to A. and B. sed non allocatur, for per Curiam, he may do so before Judgment at any time this not being like a release of one jointly sued, and Judgment affirmed.

Dominus Rex *and* Davis, &c. *Monday*, Feb. 10.

(70) Coron. IN an Indictment of murder, against him and thirteen others hired by Sir Philip Howard to keep possession, for killing one that came in aid of the Constable on a Justice of Peace's Warrant, he was admitted a good witness notwithstanding the Bill of murder found against him by the Cozoner or Grand Jury, there being nothing in proof against him of the fact upon the evidence, nor that he assisted.

Winston

Winston *and* Pinkney. *Wednesday*, Feb. 12. Ante.

WInnington excepted in arrest of Judgment that this can be no reservation because there is no reversion, as in case of an Assignment, because there the reversion is in some body, and by deed this were good only by way of grant; but per Curiam all is one with deed or without deed both being by way of reservation, and 14 H. 7. 3. per Frowike is not Law: also this is debt for rent on lease for years, the Defendant pleads that the Dean and Chapter was seised in fee, and let to the Defendant for life by deed, not said hic in Curia prolat which per Curiam is substance, and ill on general demurrer, and Judgment for the Plaintiff. (71) Leases.

T DE

DE
Termino Paſchæ

25 *Car.* II. in *B. R.* Anno 1673.

Wedneſday, April 16.

Hale Ch. J. *Rainsford*
Twiſden *Wilde.*

Young *and* Gage.

(1) Amendment.

IN debt by Executors after Judgment by the Defendant, and a Writ of Error allowed into the Exchequer Chamber, and a Writ of Enquiry returned; Symſon prayed an amendment of not saying profert literas teſtamentarias, which the Court denied notwithſtanding the Statute 17 Car. II. cap. because its only amendable after verdict.

Cole *and* Levingſton.

(2) Bayl.

MAſter Attorny prayed better ſecurity in Ejectment on Error there being only the Recognizance of two of the Defendants, & per Curiam, unleſs all the Defendants in ejectment do give recognizance, its no Superſedeas; for as to the land its intire though to the perſons its general, and Execution awarded, niſi.

Maycoke

Maycocke *and* Holbage. *Friday*, April 18.

SAunders prayed that amendment might be accepted in a Writ of Erroꝛ, where it was aſſigned that in Hillary Term when the Action was bꝛought, one of the Defendants in Ejectment was within age, and by Attoꝛny an Enfant not ſaying tempore comparentiæ, as per Curiam he ought, ſed non allocatur, foꝛ this being in an Ejectment an Erroꝛ of the Defendants own making was a trick and ſhould not be favoured, and the Court refuſed it though coſts were offered, &c. (3) Enfant.

Harvey *and* Clayton. *Saturday*, April 19.

IN an Action upon the Caſe foꝛ a party wall built upon, wherein the Jury concluded if the Plaintiff ought to have lights, foꝛ the Plaintiff, &c. and ſpecial verdict on the Statute, 22 Car. II. cap. 11. and if the City might decreé lights where the party had not the whole intereſt that made the lights was the Queſtion, and the Court agreéd the City might grant lights on a party wall, but it was agreed to be referred. (4) Nuſans.

Drury *and* Baily.

IN Replevin the Defendant avowed foꝛ rent on leaſe foꝛ three lives, the Plaintiff replies non demiſit modo & forma, & hoc paratus eſt verificare, and on 1 Cr. 117. and Love and Underhil's Caſe, Yelverton 137. and Duppa and Mayo nil debet & hoc paratus eſt verificare, is ill, and was held ſubſtance in the Exchequer Chamber on general demurrer; & per Curiam on negative pleé, where the affirmative is fully alledged before the party muſt put himſelf on the Country, elſe they will law foꝛever, but where its not ſufficient oꝛ the later pleé by abſque hoc, there it may be, & hoc paratus, and this is ſubſtance, as Yelverton 137. and Judgment foꝛ the Avowant. (5) Pleading.

Davis *and* Lyning. Trin. 24 *Car.* II. Rot. 108.

TReſpaſs of Impriſonment and taking away ſtockings, the Defendant juſtifieth, becauſe they were bꝛought by the Defendant into the Market-Town of Bridgewater and there ſold, and ſo are foꝛfeited, by 1 & 2 Ph. & Mar. cap. 7. the (6) Trades.

Plaintiff pleads he is a freeman of Taunton Market, and to this the Defendant demurs, because thus one Market Town may overlay another, but the Court conceived, that one Market Town may trade to another, else each Town might sell as they please. 2. Sale at a Market and in an open Fair is all one, and the general practise being thus, the Court enclined strongly to it, and that selling Stockings is no Haberdash ware. Sed adjournatur.

Parson *and* Hume *in* C. B. *Monday*, April 2.

(7) Maintenance.

IN Debt by an Attorney in C.B. on an Obligation (by the Defendant as surety with another that was Plaintiff as Administrator in a suit in Court on condition to pay fees expended and due and to be due, to which the Defendant demurred, and for cause shewed that this is for maintenance and against Law, and it was argued by Broom for the Defendant, and Turner for the Plaintiff, on 9 H. 7. 18. b. that this is but an attempt to maintain. Vaughan Chief Justice and Atkins inclined this is maintenance or unlawful by the surety, if it were said, the suit is yet depending, and as to fees to become due, but Windham and Ellis contra that its good enough, this being unlawfull but by construction, and therefore the Defendant should aver it was for unlawful maintenance, and not leave it to the Court who will not presume nullum iniquum, but where a Condition is to kill J. S. or do other thing that can have no other construction, and as Hub. 12. any part of condition void by the Statute voids the bond for all; but not so at common Law, and therefore this is good, for the Fees due which may be paid by any one as well as the party. Sed adjornatur. 153. pl. 16.

Kirby *and* Pigot. *Tuesday*, April 22.

(8) Abritement.

THe award was that the Defendant pay the Plaintiff 10. s. and all costs expended in his suit, which is but of one side, and being incertain, Levins excepted in arrest of Judgment in an action upon the Case, on a mutual assent to perform the Award. 2. The declaration contained an indebitatus generally for 10. s. (not saying for what) prius debitis, and by Twisden and Rainsford (the rest absent) this is ill, and so is the former, Sed adjornatur, it not being said that the parties should be friends, &c.

Wright

Wright *and* Wording. *Wednesday*, April, 23.

IN Tresp̃as the Defendant justifies as an Officer for the smoak-mony upon 14 Car. 2. cap. 11. & 16 Car. 2. cap. 3. upon which plea Judgment was for the Defendant an Under-Collector. Jones prayed costs upon the first Act though no Officer named therein, the later not taking away the costs given by the former. Sed adjrnatur. (9) Costs.

Smithson *and* Symson, Atkinson, &c.

IN an Action upon the Case for false indicting the Plaintiff of Perjury in swearing his father paid no tithes in suit betwẽn the father and J.S. tryed before Wild in Yorkshire, Crofts excepted that it was not shewed in what suit whether Debt, or an Action upon the Case, &c. Sed non allocatur, but per Curiam were the first Indictment ill, though no Conspiracy will lie, yet an Action upon the Case will lie, and Judgment for the Plaintiff. (10) Conspiracy.

Goulding *and* Herring.

ACtion upon the Case, for scandal of Title, that Henry was seised, and on his death it discended to William the son of the Plaintiff, and the Defendant said the Deeds, Title and Fines of the Plaintiffs Estate in the tenements are nothing worth, and that unless they agreed the Defendant would make him spend so much per annum, by which he was like to be sued by one Brikerstaff without other Special Damage for wich cause Polixphen excepted in arrest of Judgment, and per Curiam there should be a special dammage, especially the Defendant claiming the Title, and Judgment stayed as in the Vicar of Gosberkirks Case, who was presented instituted and inducted, and Manning the Parson, Impropriat and tryal at Bar, wherein though licence of appropriation was not to be found the Court from Edw. 4. time would ex diuturnitate presume it. After verdict for the Plaintiff he brought an Action for saying it was not well appropriate per quod multipliciter pergravatus and a nil capiat per Billam was awarded, against an opinion in Bucklies Case it was agreed that though the Defendant claimed the Title, yet being malitiose found by verdict the Action lieth, but if upon the evidence any probable cause appeared of claim, it ought not to be found malitiose, also the Damage must be particular as Sir Gilbert Gerrards Case & nil capiat per Billam, Nisi. Manning (11) Slander.

Manning *and* Bucknal. Hill. 24 & 25 *Car.* II. Rot. 1035.

(12) non est factum

IN Debt on an Obligation the Defendant pleads it was delivered as an Escrow, and so non est factum, & hoc paratus est verificare, to which the Plaintiff demurred, especially because it tended to the general Issue, & per Curiam this is a Plea that may conclude either way, and is most usual with this conclusion, though generally where the negative Plea doth waive all precedent, he shall conclude to the Country, as on non-assumpsit infra sex annos; also by Hale Chief Justice an Escrow may be given in evidence on non est factum, as well as suspension on nil debet; but Twisden and Wild doubted: But upon a general negative Plea the conclusion must be to the Country, but an affirmative Plea may be & hoc paratus est verificare, unless it come in answer directly to a precedent negative, and Judgment for the Defendant, Nisi.

Radley *and* Manning.

(13) Usury.

IN Debt on an Obligation upon Oyer, the condition was to pay by a certain day; the Defendant pleaded the Statute 12 Car. 2. cap. and said that the Contract was usurious, but per Curiam being made after the bond forfeited to receive Interest according to the penalty which was double the principal, it doth not void the Obligation that was good at first, but only subjects the taker to other penalties, and Judgment for the Plaintiff, Nisi.

Dixe *and* Long, Jenman, &c. *Thursday*, April, 24.

(14) Covenant.

IN Covenant to build an house juxa regulas præscript' in the Statute 19 Car. 2. cap. the breach was assigned in not covering the tanteleyers, with lead juxta regulas prædict' in the foresaid Act of Parliament, to which the Defendant demurred; and by Twisden it should be recited that the Statute doth so prescribe. Wild contra, that this is not issuable, but confessed by the demurrer not to be done juxta regulas præscript' in prædicto actu, but the other is a sufficient averment. Et adjornatur.

Dominus

Dominus Rex & Latham & Collins. *Friday*, April, 25.

IN an Indictment of Perjury Saunders prayed a new Tryal, (15)
because the parties were convicted of swearing a symo- Tryals.
niacal contract against Jackson a Parson in Worcestershire by the testimony of Jackson only, and though upon Sir John Jacksons Case it were held that no new Tryal can be after acquittal, yet per Curiam in cases of conviction a new Tryal may be, and so was Turners Case who after conviction of Baretry had a new Tryal, and was acquitted, and so was Primates Case, Abbots man, and per Curiam a new Tryal was granted.

Thomas *and* Sorrel. *Saturday*, April 26.

BAron Thurland for the Plaintiff, At the Common Law, (16)
Taverns were lookt upon with an evil eye 18 Ed. 2. Wine.
Statute view of Frankpledge Artic. 28. & 7 Ed. 1. Iter Ray Bag, one Article was to enquire of such as therein sate tipling & 51 Ed. 1. Cotton also by the Statute & Regist. 184. F. N. B. 173. this appears, and their great number and disorder was the occasion of 7 Ed. 6. cap. that took away their general liberty and works properly as a dispensation which is not legis abrogatio, but as Grotius non est actus absoluti dominii only imperii, therefore the King hath not the same power to dispence as to grant his own Lands, but to dispence with Laws is as to particular persons and times, which as 11 Co. was introduced propter impossibilitatem providendi for all particulars, whereby its evident dispensations are only applicable to particulars not to generals, being actus jurisdictionis quo honoratur lex cum ex parte tollitur; and though 11 H. 6. 76. Rot. 379. Statutes that are to prevent common mischiefs, 39 H. 6. 38. cannot be dispensed with 1 Inst. 244. by non obstante, so Hub. 175. of Symony, & Hub. 147. of Marriages, & 3 Inst. cap. 71. of the oath of Supremacy, 5 Ed. 4. 22. by all the Justices, 1 H. 5. cap. 5. of Additions binds the King, and hereby it appears that the manner of the act makes the ground of dispensation, and its no safe rule that unless the Subject be malum in se, they are dispensable, for all the former cases are of mala prohibita, omnia præcepta in legibus continentia intentionem legislatoris sunt indispensibilia. Also although the King might dispense with this Law, yet the dispensation is

void

void for the generality of persons and duration of time, 1 Ed. 3. on Commission of Oyer against Cressey, the Justices were commanded to continue the plea, yet the Judges gave Judgment, and it was affirmed in Error, because else it might so be continued for ever; and such dispensation is rather abrogatio legis, therefore void also, And as to the Letters Patents 9 Jac. they are prejudicial to the power of the City to licence forty only, which is preserved by the Statute 12 Car. 2. cap. which must either take it away or add infinitely to it by making as many licences as freemen.

2. This dispensation shall not bind the successor but is determined by the death of the King that made it, which is evident from the nature of the thing being no interest but a bare licence to which the Kings Grant gives barely an esse, as Dyer 270. and the nature of all powers is the same, as Lach Molineux Case, & Latch 170. upon 3 H. 8. cap. 5. the like of Commissioners of Sewers or of Undersheriffs made by the Sheriff, Hub. 14. Also this power of dispensing is incommunicable, and proprium quarto modo to the Crown, and 7 Co. cannot be delegate to a Subject, so the Defendant Sorrel hath not licence from the King but from the Corporation as a Freeman, Trin. 43 Eliz. Rot. 602. Co. Entr. 377. Information against Smith in C. B. also the Lord Gorings Case the form of the licence was set down that it might appear what is dispensed with; as to Trin. 2 Jac. Norris & Mason upon Patent, 17 & 9 Eliz. in the Exchequer, is the same with this in question, and Jay & Wright upon Patent 9 Eliz. confirmation 1 Jac. were not the same case being Judgments, the year after the confirmation which they were necessitated to plead, and did not depend upon their first Patent but renewed it.

3. The Proviso in 12 Car. 2. cap. doth not preserve the Cities power unless the Patent be good, as Dyer 52. because the Statute it self of 7 Ed. 6. is destroyed, and the the Proviso is restrained and explained to lawful usages, the dispensation operates principally on the penalties not upon the commands or the prohibitions of the Law, as the non obstantes in Acts of Parliament do; but this is an adjective Proviso only in nature of a saving, as Pl. Com. 563. & Hub. in Sheffields Case, and the Case of Waterford was on the exception 14 H. 6. cap. of the Kings licences, so reacheth not this Case, and so Judgment ought to be for the Plaintiff as he argued before.

Ellis Justice of C. B. for the Plaintiff, As to the Statute 7 Ed. 6. the preamble shewes the inconveniences of the resort and

and multitude of Taverns, and the body regulates them, and the Patent 2 Feb. 9 Jac. incorporates the Vintners with power for them and their successors in the City of London, and Suburbs in three miles, and in all Post Towns to erect and set up a Tavern, and by themselves or servants to sell, non obstante 7 Ed. 6. or any other Statute made or to be made: Then 12 Car. 2. cap. enacts that none shall keep Taverns but such as are licenced, with Proviso not to prejudice the Corporation in lawful usages, and they were an ancient Corporation, and the Defendant a Freeman and kept a Tavern within three miles of London, and these Letters are not good in their creation; but if they were they continue notwithstanding the death of the King; and the Statute 12 Car. 2. cap. hath taken away the licences, but if the Patent were good they are preserved by the Proviso, the History of Math. Paris 810. & 811. & 814. and Prins Animadversions on Records, 828. 4 Inst. 128. and Davis 69. is large of non obstantes which are neither to be advanced nor condemned; but as 11 H. 7. 11. & 11 Co. 88. the Case of Monopolies, used in Cases of necessity and emergence; but where the King cannot pass any Judgment or trust pro bono publico as to the particular circumstances, there the Dispensation is void; and so its here, for there must be provida relaxatio which must be an act of judgment and knowledge, which cannot be but of particulars; and here the persons are too General, being to all Freemen of what behaviour soever without stint to any number, and the places are so wide and large that no Judgment can be of them, but is rather a repeal, which must be by the same persons that made it, and if the King may do thus to one place he may do it to all; but dispensations with particular persons are presumed to be utilitate pensata, but this cannot be so; also the King cannot dispence with the Law as to place to alter a Custom, Patents Br. 100. or the Civil Law as Trin. 15. Jac. Roll. 201. Stidsons case, nor can the King make a place that is not so, to be governed by the Civil Law, Roll. 179. much less to be governed contrary to the Statute; also 7 Ed. 6. cap. was to superseed a greater Nusans than New Buildings, which yet the King cannot dispence with, because these concern the publick. As where Abbot is bound to repair a Bridge, 7 H. 4. 4. & 3 Ed. 3. Assize 45. Com. pl. 487. the Kings pardon of Indictment was void. 3 Inst. 454. When the Statute makes any thing tortious for the publick good, the King cannot dispence it. Also 3. This Patent is primæ Impressionis; and only enjoyed by the Vintners, and therefore being accompanied with such inconveniencies as these

would produce are void, for by allowance of this, the Brewers might obtain exemption of their Corporation from Penal Laws, or the Merchant adventurers obtain a Licence to import all Merchandise that is Prohibited, and therefore in Patents of this nature it hath been better to adjudge the King deceived, than let in a deluge of mischief.

4. This would at least introduce the same inconveniences as a delegation of his power would do, and 20 H. 7. 28. 7 Co. 25. Calvins Case, the K. cannot grant power to others to make a Denizen, which is of the same mischief; and the power to make Free is the same, though they claim to be in by the King. As Hub. 183. Davison and Bakers Case, Corporations are not capable of a grant of Penal Laws, for thereby they might dispence with them, and the same device was 7 Co. 36. condemned in a stronger Case than this at Bar; there nothing was done effectually till the great Seal came, but here all is done by making free. And Co. Entr. 370. Sir Walter Raleighs Case was the like, and therefore condemned, and if the Corporation under Seal cannot make such a grant to sell Wine, much less shall they do it by making Free: Also in Magdalen-Colledge Case, grant of Lands by Bishops to the King cannot be dispenced with, though it be only malum prohibitum, and 2 Inst. 154. the King cannot dispence with Oath of Supremacy in Knight of Parliament, and 2 H. 7. 6. of making a Sheriff for life is but as to single person, this is to a multitude; and 12 Co. 8. this Act concerns the King in point of Sovereignty which cannot be restrained in Thesi or Hipothesi by Act of Parliament as to pardon Murder, &c. Also the King had an Inheritance in the Sheriffwick, which passeth out of the Kings interest and may be for personal merit, and cannot be to as many Heirs as he pleaseth. And as to the Case of Waterford the Patent was good, because the King had the sole interest of the Customs, and 2 H. 5. cap. 6. excepts the Kings Licence, and 2 H. 6. cap. 4. was the Statute on which the Action was brought in the Case of Waterford which confirms the former Acts, saving the Kings Prerogative for whose benefit these were made, & quilibit potest renuntiare Juri pro se introducto. As to the greatest objection of the two judgments of Wite and Ratcliff, and Write and Smith the same Term where Judgment was for the Defendant in both, but sub silentio without argument not in any Report of those times which I have; and the Record it self shews there could be no argument: Demurrers being joyned the same Term & dies datus till Octabis of St. Michael, and then Judgment is given; So do not bind

bind the Court, but the Patent is void in its creation: 2. Admitting the Patent were good, its not determined by the death of K. James that made it, though I argued contrary before, for this isnot a bare licence, but at least coupled with an interest, for all bare authorities as Commissions to Judges, Sewers, &c. do determine by the Kings death, and the King as 8 Co. 82. Vinyers Case; the King might have revoked it at pleasure, it being against the nature of an authority not to be countermandable, and it was never affirmed the King himself could revoke it, therefore its not determined by the Kings death, the rather because its an authority executed: Also all authorities must be executed in the name of him that grants it, but this Corporation doth not act in the Kings name nor to his use, and thus 3 Mar. Dyer 92. Grant of Tunage determines not, and Licence to transport Beer, if for the King and his Successors determins not; so Dyer 177. Licence to travel is not determined by the Kings death; and Dyer 270. this gives as much interest as the grant of Liberties and Franchises which are not in the King, but in his Prerogative: Also this Licence doth but restore the Subject to the Common Law, by which he might keep a Tavern. Young and Right, Hill. 1659. Roll. 394. in C. B. in Covenant on Wine Licence, the single question was the same as here, and by the Lord Bidgeman, & per Curiam, this was held not to be determined by death of the King on solemn argument.

3. The Statute 12 Cr. 2. cap. doth take away these Patents, but the Proviso doth exempt and save them from this Law, and nothing more plain than that Proviso's give no right, if they had none before; but its admitted they had a right before, and there were no question on the first words; and the saying, but that they may exercise all lawful liberties, &c. is a several and distinct clause, rather for the advantage of the Vintners than to their prejudice, and had the Proviso been all one Clause this usage being by a Law is a lawful usage and liberty, and Judgment for the Plaintiff, as to the latter two points; but the former being greatest, Judgment pro Rege: But all the Judges held strongly that this was pardoned by the Statute 25 Car. 2. cap. of Pardon, Infra.

Dickison *and* Holcroft. *Munday*, April 28.
Tuesday, April 29.

(17) Marriage. F. N. B. 44 A. 50. S. 120. K. 13 Ed. 1. St. 4. p. 55.

IN Assumpsit one mutual promise of Marriage, it was excepted in arrest of Judgment that no Action upon the case lyeth, being a Spiritual matter: But by Atkins Justice in C. B. the loss of Marriage is Temporal, without other loss, as 4 Co. 16. & Trin. 11 Jac. 1. Roll. 35. §. 4. and its only the goodness or validity of Marriage that is Spiritual, the loss is Temporal and no recompence in the Spiritual Court for it: Also on promise that concerns Marriage an Action will lie, as for money for Portion, &c. and so Judgment for the Plaintiff. Ellis according; so Windham Justice and all the cases of Portion and the like are where there was a Marriage and so remedy in the Spiritual Court: but here is no Marriage but only a promise that if the Plaintiff would marry the Defendant within a fortnight, the Defendant would marry the Plaintiff, which is a Temporal matter that interposeth, which is sufficient to support the Action, though the matter be Spiritual as on Grant of a Pension by deed, though between spiritual persons is suable for at Common Law; 14 Ed. 4. b. 6. & Ass. 7. and the former cases shew the same difference; and a promise is as much a Temporal act as a Covenant, as F. N. B. 44. A. 120. K. Also mutal promises are sufficient alone to support the Action: of which the Spiritual Court hath no Conusans, nor is there a more valuable consideration in our Law than marriage, to setle an Estate, against which the same objections may be made, as here for Damges: But suit on such promise to execute the Marriage must be in the Spiritual Court, but not for the loss which is grounded on the agreement which is a Temporal act, and the ill obtaining this by catching surprise, or of an Infant, these are only Evidences to make them void, or in mitigation of Damages, and in Hub. The consent of the Mother is of less moment: And Moor 605. the gaining of Administration is a Spiritual act, yet a promise of it is Temporal, Hut. 7. Peter and Stafford, Hub. and 1 Roll. 22. Upon debate an Action was maintained; and the stream of authorities being this way Judgment for the Plaintiff.

20 Ed. 4. 3. pl. 17.

Vaughan Chief Justice for the Defendant, that this suit is only since Queen Elizabeths time, but an absolute silence before, though the occasions of it were as great as ever, and no Judgments of the late times are to be considered in regard

gard then the thing it self was Temporal, P. 14. Car. 1. Stretch and Parker. 1 Roll. 22. §. 20. was a single Judgment, and multitudes thereof do not oblige so, but each Court must give Judgment according to true inferences from the reason of the thing, and the conveniencies or inconveniencies of presidents is more proper for Parliament, as the making good the Judgments in the late times that were not warranted before; also there are doubtless many Ecclesiastick matter for which there may be Temporal promises suable in the Kings Courts. But this matter of the Marriage is of more latitude, and in all pleadings whereof the Plaintiff entitles himself, he must Averr himself is not faulty in that matter of which he was suspected, for no Action lieth on the private speaking of the words, but on the publick suspition, that thereby Groves and the Plaintiff here hath not averred that this intended was a lawful Marriage, and the Law suspects every Marriage: And her saying she was parata & obtulit se, but doth not say Infra 2 Septimanas as the promise is; also when a third person is required to do an act, the Plaintiff must shew the act was so offered as it might be done; and its not said she tendred at the Church, nor when any Minister was by: And that there was three Sundays between, and a promise to take Husband notwithstanding any impediment, is against Law: And promise to take him to Husband if there be no impediment cannot be sued for in the Temporal Court, because the impediments are only of Ecclesiastical Conusance, and cannot be alledged and tryed at Common Law. As for calling one Heritick no action lieth, because the Temporal Courts cannot judge of this justification, whether he were an Heretick or not, and though the promise in Question be not so express, yet it must be necessarily intend if there be no impediment. 2. By the Canon Law, the act of Marriage at the time of it ought to be absolutely free without Coertion; and if the Minister know any restraint, he is not to marry them; as if one make obligation to marry the other, and a promise to marry is the same, and doth as much violate the Marriage: And the judgment of the Canon Law hath been suitable, which is not to be altered by latter authorities if the reason be better, else its all one to go out as in the way; and this will render the Law not worth ingenuous profession 17 Ed. 4.4 is, that no Action lay at Common Law for a Marriage Portion, because the parties were not free to plead to it more than because it was spiritual. And 14 Ed. 4. 6. Debt for 20 l. on contract of Marriage, A Nil Capit was Awarded, and whatever is said to the contrary

Brac. 401. b. §. 5.

trary, is but the opinion of the Reporter. 45 Ed. 3. 24. In debt on Covenant to marry the Dſendants Daughter he was forced to anſwer being on a Deed, but its ſaid that without Deed it ſhould be otherwiſe, and 22 Aſſ. 70. Det. Br. 134. is only a tranſitory opinion, no Caſe adjudged, nor differs not from the former Caſe, but is expreſly the ſame, for the money could not be promiſed by Covenant unleſs by Deed, yet F. N. B. 44. A. is grounded thereon which hath miſlead ever ſince, he taking no notice of the former difference, though 15 Ed. 4.32. & 19 Ed. 4. do preſerve it, as that ſuch promiſe hath not quid pro quo, therefore without Deed is nudum pactum; not that the Spiritual Court could determin the mony but the Impediments; ſo they gave no Execution; but as for a Legacy by proceſs of Excommunication. 3. Alſo the Caſe in queſtion admitting the Caſes precedent, the promiſe was not to be ready but actually and abſolutely to take him to Husband, which is nudum pactum without any conſideration, yet on obligation for not marrying, ſuch a tender had been ſufficient, but this is grounded on want of recompence for the thing promiſed; therefore whether at requeſt or without, is but nudum pactum, and it was in her power to perform it, though it was not in his power to queſtion her for the not performance, but this could not be performed by her unleſs by him alſo, and the promiſe on conſideration to Lodge with me in the ſame Chamber or Bed, I will lie with you, this muſt be averred performed, as to read in my hearing or ſaluting in my ſight, theſe if done by the Plaintiff cannot but be done by the Defendant: therefore muſt be averred as well where its to Party as where its to a Stranger, and ſo Judgment for the Defendant. But becauſe the three others were Contra, Judgment for the Plaintiff.

Holding *and* Haling. *Wedneſday*, April 30.
Thurſday, May 1.

(18) Dyer 360. pl. 6. Tryals:

IN debt here for Rent on Demiſe of Lands in Ireland, the Defendant pleads that before any Rent due, the Duke of York was ſeiſed in Fee and Entred and ouſted the Defendant, to which the Plaintiff replies that the Duke was not ſeiſed modo & forma, & hoc petit quod inquiratur, &c. to which the Defendant demurs, and for cauſe ſhews non bene concluſit; and Hales Cheif Juſtice conceived this muſt be tryed in Ireland, but no ſpecial cauſe being ſet down

down in the Paper Book. Judgment for the Plaintiff, Nisi.

Harlow *and* Brodnox.

IN Avowry as Baily to Husband and Wife for Rent areare, the Plaintiff demurred especially upon the Paper Book, that the Marriage is not averred, sed non allocatur. 2. The life of the Wife is not averred, which by Hales Chief Justice is ill on special demurrer, but on Verdit or general demurrer it would be well enough, & adjornatur, on Sury and Pigots Case. (19) Baron and Feme.

Dean and Chapter of Westm. *and* Braughton. Ante.

THe claim of the Plaintiff being confessed by Mr. Attorney under his hand, Judgment was as to the Office pro Decano, that the Kings hands be amoved saving the right of all; and that this extend not to the Prison house. Ex motione Dalby. (20) Forfeiture.

Benet *and* Benet.

IN Debt upon articles to surrender at the Court of Puddimore, upon notice; The Defendant shews that notice is alledged at London the day of the Court held, and that Puddimore is above 200 miles off, and so no sufficient notice; The Plaintiff replies he had sufficient notice; to which the Defendant saith he had not, to which the Plaintiff demurs and specially on the paper Book, shews that Issue is on the time and place of notice which is not material, but only put for a Visne. But by Hale Chief Justice, Though the time and place of notice, generally be not material, yet here it makes the Case and the Surrender to be thereon is Penal, and therefore he advised the Plaintiff to discontinue Adjornatur. (21) Notice.

Dixie *and* Jenman. Ante.

IN Covenant to build a House and cover it with Canteslivers, Juxta regulas prescriptas, in Act of Parliament. Breach averred it was not covered with Cantelivers, to which the Defendant demurred: And Levins prayed Judgment, which Hales Chief Justice granted, nisi; because the very Covenant it self Estops to say it was otherwise in the Act of Parliament (22) Estopple.

liament, but were this not the Covenant it self, the breach were too short unless it be averred that the Act of Parliament is to cover with Cantelivers, &c.

Earl *of* Lincoln, *and* Clysam in *C. B.*

(23) Encumbent.

IN a Quare Impedit, the Plaintiff declares that Theophilus Parle of Lincoln was seised of the Advowson of Bigleſworth, and that he presented the Defendant, after which the Defendant accepted a second Benefice, not saying of what value; which per curiam is needles: After which Theophilus died and the Advowson descended to his Heir the now presentor of the Plaintiff, to which Newdigate for the Defendant demurred, because here is no title shewed for the Plaintiff; because avoidans being in the time of Theophilus is a Chattle vested in him and goeth to Executors, as F.N.B. 33. B. and could not descend to the Plaintiff as Patron, which the Court agreed, whether in Gross or Appendant; for it is not in the parties election to make it an avoidans or not, and the Court are bound to take notice of the Statute, 21 H. 8. cap. 13. though not mentioned in the Declaration: Also the alledging he was instituted though it be not said he subscribed the Declaration in presence of the Bishop, its well enough, per Curiam, præter Vaughan Cheif Justice. And Judgment for the Plaintiff, Nisi.

Turner *and* Price.

(24) Executors.

IN Action upon the Case against Executor and Judgment by default, and a Writ of Inquiry, & nulla bona returned on a Scire facias; And a fieri facias with a scire is awarded, and a devastavit returned, and thereupon Judgment against the Executor de bonis propriis. And now Newdigate prayed that plee might be accepted: the Plee being offered before Judgment signed, & per Curiam, and the Prothonotaries, it was accorded to be accepted on search of the Precedents, and though Judgment were given its time enough before Execution; but especially its so before Judgment signed.

Perce

Perce *and* Hume. Ante 140. pl. 7. *Friday*, May 2.

The Plaintiff as Attorny, brings Debt on obligation: Upon Oyer, the Condition was that the Defendant and Sanderſon, their Heirs and Executors and Aſſigns pay to the Plaintiff, &c. all ſuch ſums of mony Fees or Expences, or otherwiſe laid out and expended in Chancery, or at Common Law in ſuit, between Wright and in Ejectment of Tenements in Southby, or ſhould be hereafter expended, and thereupon the Defendant demurs, ſuppoſing the condition againſt Law and maintenance, being by ſuerties; but per Curiam the Plaintiff ought to have Judgment: And Vaughan Chief Juſtice delivered his opinion ſo, becauſe ſome maintenance is lawful, and by this demurrer the Plaintiffs Juſtification is taken away; but if he had pleaded generally, in which Caſe the Plaintiff muſt aſſign Breach; or that he had performed what was good, viz. payment of fees due, and demurred to the reſt, it had been well: Alſo, if the Principal cannot maintain, the Sureties cannot, but the Attorny might: As 36 H. 6. & 11 H. 6. but ſince 3 Jac. cap. eſpecially its clear; and ſecurity may be as well for any money as for what is due, for if upon account the Attornies Bill be not right he encurs the penalty of the Statute, and Judgment for the Plaintiff. (26) Maintenace.

Manning *and* Avery, *in* C. B.

Serjant Barton excepted in Arreſt of Judgment in Slander, ſaying the Plaintiff had mortgaged all his Lands for 100 l. and that he had no power to ſell or let the ſame; & per Curiam, Judgment ſtaied, there being no ſpecial Damage nor particular Colloquium of treaty to ſell to any perſon certain; but only that the Plaintiff intended to ſell it to any that would buy, which is too general. (27) Slander.

Niller *and* Green. *Saturday*, May 3.

Trover de 3 tribus parvis Teniolis Angl. Ribands, it was excepted in Arreſt of Judgment that this is incertain; and ſo Hales Cheif Juſtice conceived. (28.) Trover.

Dominus Rex versus Corpus Winchelsey. Ante.

(28) Corporation.

Wilmot on 1 Car. 265. & 21 349. Excepted to return of Ceritorari to Winchelsey to remove Dyers made by the Corporation against the Land holders, pro relevamine Corporationis, 21 Ed. 4. 10. & 24 H. 6. 53. because this is a Mandatory Writ, Quare Impedit 165. and the parties are remediless, unless there be a return: Also the Certiorari is to the Corporation, not to the Lord Warden; and F. N. B. 245. therefore they must return, Mich. 8 Car. 1. Dugdales Case, Noyes's opinion was they must return where it contains special matter of oppression, and is not between party and party; 30 H. 6. 6. Cinque Ports Br. 26. Co. Enter. 298. they must shew the party may have relief otherwhere, else they cannot deny the Jurisdiction of this Court. Brewer conceived the return good, that Winchelsey is a member of the Cinque Ports ubi Breve Domini Regis non Currit, and so cannot return; and in criminal Cases 1 Car. 184. Certioraries do lie where the King or the liberty of the party is concerned, and 2 Car. 543. and Yelverton 12. and 2 Inst. on artic. super Cartas. cap. 7. and in the Exchequer now its returned that upon occasions of War foreign they being Janaua Regni may impose Taxes, and have constantly levied them without opposition. Rast. Entr. 115. Hales Chief Justice said they should shew some superintendent Jurisdiction where the parties are relievable, as on Mandamus to University they shew Visitors; and Co. Entr. the Case of exemption of Coleharber from London was held ill, without shewing under whom they were; so here it should be said, this were examinable by the Lord Warden, &c. and this is neither purely the Kings suit, nor the parties, but mixt, as where a Habeas Corpus is to shew why the party is imprisoned, and in all Cases of Certioraries to Durham as Justices they are allowed, and where they are to the Palatine, its always returned that there is a superior Court, viz. a Chancery, &c. else its but in effect to take any mans Land without remedy; and to this the Court strongly inclined; sed adjornatur for quantity of Amercement.

Thomas

Thomas *and* Sorrel. Ante.

IN the Exchequer Chamber, Atkins Juſtice of C. B. for the Defendant; as to the firſt point, that the Letters Patents were good in their Creation as he had argued in the Caſe of Thomas and Walter, which he ſaid he would not have argued but that his judgment was ſo; by the Common Law its lawful to ſell any thing uſeful to Mankind and Trade is the wealth and ſtrength of a Nation, and favoured againſt Idleneſs, and the abuſes are the faults of the uſer, not of the thing; and the miſchief of Taverns appears by ſeveral ancient Statutes, as ſelling corrupt Wines, and ſuffering too Common reſort, and ſetting them up in ſuſpitious places; and as the numbers increaſed ſo the miſchiefs increaſed, which were mala in ſe, and puniſhable at Common Law in the Eyer, Leet or B. R. by fine Impriſonment and Pilory, and evil rule was indictable: And Taverns in back-lanes are nuſances, but the number is not malum in ſe, but as joyned with the other circumſtances of ſelling corrupt, or leſs than Aſſize, and yet the Statute 50 H. 3. de Colliſtrigiis puniſheth only the Taverners, and the Statute of Leet only the Vauntors: But the Statute de Piſtoribus is the firſt that ſhuts up their doors, which was not a puniſhment at Common Law, but required an act of Parliament: Alſo this Statute cautions that the Vintner ſhall not be always diſabled, but that on reformation he might by licence from the King ſell again, ſheweth the Kings Prerogative to diſpence with this very Statute, and 2 Rich. 2. cap. 1. excepts wine, which it allows not ſtrangers to retail, which is by the great care that was taken to Corporations in this particular 4 Ed. 3. cap. 12. finds no fault with the increaſe of Taverns; the Kingdom being more populous 7 Ed. 6. cap. was the firſt that put any conſiderable reſtraint upon ſelling wine with limits; the times numbers and places, and appointed the perſons that ſhall licence them at pleaſure, and in this Statute the mala in ſe were the miſrule and diſorder, the mala prohibita was keeping without licence; or more than licenced, theſe are prohibited only in order to reform the mala in ſe: Alſo the ways of puniſhing miſrule at Common Law remains ſtill, the oſtia Claudenda may be uſed ſtill: Alſo the Patent 9 Jac. to the Vintners is only to the Company and its members to ſell in their houſes, or elſewhere, within London or 3 miles, or Poſt Towns between London and Dover, or Dover and Barwick: Not all over England; and though this Diſpenſation is ſaid to come from (16) Wine.

Rome, yet all is not ill that comes thence; but this is a Prerogative as ancient as Common Law: Also dispensations are as other things good or bad as they are used, though Acts of Parliament are with great advise, yet none can foresee events, many things seem true in reason that prove false in experience; and a beneficial Law at first by change of things may be mischievous, therefore is there this great trust reposed in the King, Hub. 146. as part of the Kingdoms constitution, and differs not much from a power of equity, which is the same as to Common Law, that Prerogative is to a Statute; and Doctor and Student is that a Law against such Courts is void, hence M. 2 H. 6. 7. takes notice of this power, 8 Eliz. cap. 6. takes notice of licence to dispence with such Laws as were pro bono publico, yet doth not forbid it, but rather compounds the matter; and the Commons in Parliament Roll. 1 H. 5. Roll. 50. 2 Roll. 180. do allow this power, Cotton 470. pl. and on Westminst. 2. cap. 10. of the ne recipiatur, 2 Inst. 377. it was doubted, and at last adjudged that the King might dispence with it: Also the limiting the numbers was but a conjecture; for in every year the inhabitants on special occasions increase or decrease, and on enlargement by new building, therefore it was proper for the King to licence accordingly: Also by 7 Ed. 6. many Trades-men were made idle and useless, wherefore Queen Mary in her Patent reflects severely on the Parliament, which is recited by the Patent 19 Eliz. on which the Case of Thomas and Walter was grounded which was introduced thus, that the prosperous Estate of the City depended on these licences, which King James followed, and after him on doubt of confirmation was renewed by King Charles: Also the mala in se may be pardoned, but not dispenced with beforehand, nor can the whole Law be dispenced with; and the Patent 9 Jac. doth not dispence with any thing mala in se, but provides to use by licence and numbers that were only mala prohibita, and though there be no provision in this Patent against the mischiefs of the Statute, yet this is not the nature of dispensation to give new remedy, but yet it leaves them to the old remedy, and in effect gives remedy that the Company may Disfranchise him, and they forfeit their Patent if they do not so, and this is suitable to the rule 11 Co. 88. in the Case of Monopolies, being provida relaxatio of the mischiefs in 7 Ed. 6. which may be to particular persons, but is not restrained to them, for the reason there mentioned extends to societies: as if the thing be inconvenient to them & de omnibus particularibus, is not to be understood of persons, but things, for what concers Vintners or the City of London

London is but private compared with the whole; also here may be a certain judgment passed, as well to Companies as to particulars, for King James, pro sustentatione & relevamine hominum misterii predicti & pro meliori Gubernatione Gubernantium, &c. and societies may suffer oppression as well as particulars; also the words all that shall be free are Surplusage, and contained in the Corporation; which as the Ship is still the same however renewed by freedoms and the priviledge intirely vests at first: Also its the end of the Corporation to regulate Trade, and this Law was to deal with such in a matter of Trade; this grant is warranted by the grant Civibus de Waterford, which is a more numerous body than this of a Company, and such dispensations are as ancient as the Law it self; by Queen Mary, and since the clause as that of Bellmettle in extent of it is not wholly justifiable: Also this is no abrogation of the Law, for only the Vintners of London may sell in those places: Also the power of dispensation cannot be delegated, nor is not here a Corporation being a creature of Law and capable of a grant and dispensation, and its not like Co. Entr. 370. nor like grant that such as Vintners nominate shall sell, which is a plain delegation of power; but there is no dispensation granted, but this was to wait on their nomination; but here the King hath executed his power by the first grant; also they cannot now name any but only Freemen, who are presumed brought up in the Trade, and for misrule of particulars, the Company must suffer, as of Pisage. Moor 832 Walter and Hangars Case. The benefit to the Company enures to particular Members, and though the Company be not limited to a certain number, so may make too many or too few, yet this doth not make the Patent void in Creation, but is forfeit by the abuse at Common Law: And the Case of Waterford fully answers all these objections, all the people have an interest in the staple, as it appears by the Statute of 27 H. 6. cap. 2. & 8 H. 6. 17. & cap. 19. & 10 H. 6. cap. 7. with which there were dispensations; so the distinction, 2 Roll. 179. & 12 80. & 3 Inst. 153. doth not hold so fully as that of malum in se & malum prohibitum, 4 Inst. 135. and the Judgments of Norris and Mason, 2 Jac. and Wright and Gerard were without argument. As to the second point, though this be but an authority in the King, yet it vests an interest in the party, as in the Earl of Northumberlands Case of Sheriff, 10 Eliz. Dyer 270. Licence of Tavern by Catlin is held good without time, and the rest doubted of the Queens intent, Dyer 92. not of the continuance if it had been so expressed And 12 Car. 2. in C.B. Young and Wright, this

this was the sole point adjudged. 3. As to 7 Ed. 6. though the body take it away, yet the proviso saves it, being lawfully used, but its not material whether 7 Ed. 6. be repealed or not, and the proviso would else be prejudicial to the Vintners and if they lawfully used before, 12 Car. 2. doth either preserve it or give new liberty, such as they used before, but a colorable usage is not sufficient, and the very act that gives the Revenue, saves this to the City, 15 Car. 2. 14. and the Kings Counsel that have argued for his profit, have argued against his power; and Judges must be tender of both, and to be equal between the King and people, so Judgment for the Defendant. 2. Windham Justice of C. B. That the Patent 9 Jac. is void in the point of Creation, and in the others as Ellis did; but agreed the power to dispence is the Kings; but is not to be enlarged beyond the bounds of Law and reason: He layed these grounds, that 7 Ed. 6. was pro bono publico, to restrain the numbers place and order of Taverns; and that the King may dispence with such acts, is not doubted, but de modo is here the question: 3 Inst. 237. Where the King hath only the power, not any interest in the King. 1 H. 4. 42. 27 H. 6. 44. The King cannot dispence at all in the Cases of Bridges or Conusans of Plees by the Statute; So on 2 Ed. 6. cap. the King cannot dispence being sole for the benefit of the Subject, but 3 Inst. 154. Laws pro bono publico with penalty may be dispenced with, as to the sting or penalty, not as to the Law it self: Non obstantes are necessary to supply the defects of the Kings grants, yet are to be kept within due bounds, for 4 Co. 35. Hub. 120. & 130. & 1 Car. 198 they cannot, aid the essential parts of the grant which doth not lessen the Kings prerogative, but support it in what is right; the like for Penal Laws the King may dispence, but 7 Co. 37. neither directly nor indirectly, mediately nor immediatly, it cannot come by any else; and its the Company makes free & Causa Causæ est Causa Causati; so though the power be from the King, yet as By-Laws they flow from the body, not from the fountain that made them; and making free is a nomination of such persons as shall sell, or all one with it, or more for the particulars cannot have power to sell by the Kings grant, till a second act of making free, made by the Corporation, which is a putting into their power who shall have it, and who not, and this power in a private person is not so dangerous as in a Corporation who continue for ever; and abuses forfeit. the Charters well made, but where the thing cannot pass the Charter is void ab initio, and if this power be inseparable to the Vintners, none will take licence by the act 12 Car. 2. when

for

for a less sum he may have it by freedom, which was never the intent of this Law: Also this would but advance fines for freedom; also for persons and place the King may dispence, and on these the Judges and King and Commons have sixt it, therefore its not agreeable to Law or reason to extend it to Corporations, for the nature of a Licence is to go to a particular person, for to abrogate belongs to the same power that constituted, and a dispensation is but as a Licence, and Corporations do rather endeavour their own gain than the publick good; and the fewer the better, and licences for all that are or shall be free is against the nature of licences: Also this is but a side wind to blow up the Statute; also the place in the Patent is in all Cities and Port Towns, which are the principal parts of the Nation; but if the King may grant it for London, he may to all other places, and its not the adding extent that is material, whether thus or in all Market-towns, or in all Villages, or whereever they have houses, for still there will be some places left out: Wherefore this being matter of trust in the King, and impossible for him to judge of the fitness of such persons its void; and though the Common Law punish the misdemeanors, yet this Law was made to prevent them: Also by the same Law that this dispensation is put into the Vintners, to import Contra 3 H. 4. it may be put into Merchant adventurers, and this way every Penal Law may be put into Companies, and so all the prudent Penal Laws made by our Ancestors blown away at once; and all the Kings prerogative put into Corporations. Taverns are but the better sort of Tiplinghouses, and the King may as well give to Brewers power to sell Ale without licence, and this way by making a Corporation any Penal Law may be dispenced with; the King may grant such his own Revenue, but not such matters of trust, the very Case 2 R. 3. 4. & 1 H. 7. 12. makes the difference where the dispensation concerns the King only, and where the Subjects interest also was on another foundation, 27 Ed. 3. cap. 7. for benefit of the Kings Customs, and for ease of Waterford, they had dispensation to pay there instead of Callis; and at that time it was lawful for any to carry Wooll whether he would, and this was no part of the dispensation. As to the Cases 2 Jac. the same Mich. Term 8 Jac. In the case of penal Laws 7 Co. 37. the Judges take no notice of them in their resolution: Also the cases are one in Hill. the other in Pasch. and pleas in Trin. Term in both, and so demurrer, and continued to Octabis of St. Mich. so passed sub silentio, and notwithstanding all the Patent is void. 2. If the Patent were good, its not determined by the Kings death, for

for an authority that by the gift is executed doth oblige the successor, though but executory as to the party that hath it Pl. Com. 458. as licence to make a Park or grant Estates, Co. Lit. 54. or to alien may be performed in time of heir or successor, so F. N. B. 223. of Mortmain, and Wright and Youngs Case in C. B. H. 12. Car. 2. which I argued, was fully adjudged in this point. 3. The intent of 12 Car. 2. was to leave the Vintners as they found them, to the Judgment of the Law, and they having no lawful usage then, cannot have it now; and so Judgment pro Rege.

Hobland *and* Hales. *Tuesday*, May. 6.

(30) In Error Br. 117. SIR William Jones in arrest of Judgment, after Writ of Enquiry returned in action upon the Case against the Defendant, an Attorny of B. R. excepted that the Defendant was dead, sed non allocatur, for by Wild and all the Clerks he dying the day of the Writ of Enquiry returned, it cannot be assigned for Error, 3 Cr. 636. Skegues Case, but had the death been before, it were Error. Judgment for the Plaintiff.

Foorth *and* Ward *against* Walker *in* C.B.

(31) Sheriffs. IN Debt on Sheriffs bond on condition to appear in B. R. according to custom at suit of Man in debt, on Dyer the Defendant pleads, there is no such custom in the Kings Court as the Plaintiff hath alledged, to appear to an ac etiam in the Kings Bench before the King at Westminster, and so the obligation is void; to which the Plaintiff demurred by Turner, because the Defendant is Estopt by the condition, as 18 Ed. 4. 4. b. to say there is no such custom, and 2 Co. 33. Dodingtons Case, the difference is that general matters may be denyed by plea, but not particulars, so Poph. 114. Stroud and Willis, the Objection that this custom is confest by the demurer, as 5 Co. 69. being not well pleaded, is false; also if there be no such custom, the condition is impossible, Perkins 142. & 4 H. 7. 4. & 2 Ed. 4. 2. and the bond is a good Obligation: Br. 45. Also the condition is repugnant to say there is no such custom to appear according to the custom which admits it: Also this plea is in the Negative, denying what is not in the bond, which is not that he shall appear by the custom, but by the Writ, as usual: also this cannot be said an obligation contrary

contrary to the Statute, now because 23 H. 6. cap. 10. 4 Co. 76. Hollands Case, and Dyer 119. Pl. Com. 65. is a particular Statute and is not pleaded; and as to the last exception Windham said it had been a considerable point, being to appear to a Bill, Ac etiam, &c. then to be exhibited according to the Custom of the Court, which is more than to answer to the Writ, also Ac etiams are but new, and therefore cannot be by custom, but if it were, the Customs of Courts are to be taken notice of: Et per Curiam, The Statute not being pleaded its ill, but if the Statute were pleaded, it would avoid the bond, but adjornatur.

Eveſque Lincoln *verſus* Alton, Hammond *and* Long.

IN Treſpaſs of a Laod of Hay, &c. the Defendants as to taking 4 load not guilty, as to the load reſidue the Defendant pleads the Biſhop was ſeiſed of the Mannor of which the place, &c. is parcel, in which is by cuſtom a Leet, in which the Steward uſed to impannel 20 reſiants, to enquire, and cuſtom that theſe Juroꝛs name three Copyholders to ſerve as Meadow Reeve, oꝛ Bailif, whoſe office by cuſtom, after ſwoꝛn, is to ſerve in collecting Rents, and carry them to the Loꝛd, and run the hazzard of carriage. And if the parties be inſolvent. Copyholders anſwer, &c. that the Defendant was appointed by the Loꝛds Bailif the firſt year accoꝛding to cuſtom, and that by cuſtom ſuch foꝛ there pains ought to have, and may take a load of Hay on oꝛdinary carriage, and that he ſerved, &c. and ſo Juſtified, to which the Plaintiff demurred. Newdigate excepted that though the matter be ſufficient foꝛ conſideration, yet as 2 Bulſtr. 201. its not averred ſuch a load as may be carried by oꝛdinary carriage, but Contra here its ſaid to be 6000 weight which is unreaſonable. 2. Its here ſaid every Meadow Reeve ought to take, &c. (not ſaid foꝛ the time being) Serjeant Jones foꝛ the Defendant, Its not ſaid to be by an oꝛdinary load in an oꝛdinary Cart, but ſo much Hay as can be loaded on an oꝛdinary Cart and carried away: Alſo it muſt be intended this was foꝛ the Meadow Reve foꝛ the time being, the Defendant being ſo averred, but per Curiam, it being not averred an oꝛdinary Cart, but only a Cart then uſed, its an ill Plea: alſo what a Cart-load is, is notorious, and what evet new invention may load more, that is not material: alſo its not averred that cuſtom is foꝛ ſo much as the Defendant could draw, noꝛ what

(32) Leet.

the Load is, but this being more proper for Issue Adjornatur.

Leanes *and* Cox, *Administrators*, &c. *of* Cole.

(33) 1 Brownel. 773. pl. 384. Assets.

IN Debt on a Bill of 20. l. as Administrator of Cole, the Defendant pleads that Cole 1667. entred into bond to him of 500. l. and that he retains this, and hath no assets ultra. The Plaintiff replies that this bond was for performance of covenants and none was broke, the Defendant rejoyns the particulars, and avers that the mony was not paid, the Plaintiff sur-rejoyns that there was only this 40. l. & 6. s. for interest to be paid, and that the Defendant had more in his hand than would satisfie it; but fraudulently keeps the bond on foot, to which the Defendant demurred as a departure, and the forfeiture being confess, the acceptance of a lesser sum will not aid, which the Court agreed notwithstanding 1 Cr. 491 the taking of less sum, having been often ruled a Devastavit, and Judgment for the Plaintiff.

Workhouse *and* Simons, *in* C. B. *Wednesday*, May 7.

(34) Vaughon. 89. Executors.

IN action upon the Case by the Plaintiff, as Attorny of C. B. against the Defendant as Executor, The Defendant pleads several Judgments ultra quod, he hath no Assets, the Plaintiff replies that the several Judgments were compounded for less, and kept on foot by fraud; the Defendant rejoyns that he did not permit the said several Judgments (not saying nor any of them) to continue on foot by fraud to deceive the Plaintiff, to which the Plaintiff demurred, & per Curiam this is a fatal exception, for each Judgment makes a several issue, therefore should be particularly answered. And Judgment for the Plaintiff, Nisi.

Cloak *and* Hooper.

(35) Covenant.

IN action of Covenant for quiet enjoyment, breach was assigned by Lease from the King to begin after the death of Arnobia, &c. & 1 Roll. 430. §. 10. & 520. §. 3. & Hub. 12. Its averred Arnobia was dead, but its not averred that the Lessee entred, nor the Court inclined he need not, for it might be

be by Bargain and Sale: &c. Also its not said that any of the three lives of the first Lease were in being, which it was said he should, but adjornatur.

Shaw *and* Staughton. Mich. 22 Car. 2. *Rot.* 505. *in* B. R.

(36) Ireland.

IN action upon the Case against the Defendant as Administrator to I. S. the Defendent pleads Recovery in Ireland, by Lambert Administrator to I. S. Intestate there, and that the Defendants Intestate died there, viz. Weston, to which the Plaintiff demurred, and notwithstanding 1 Roll. 909. Noy 54. where dettæ is put for debtor as 3. Cr. and Needhams Case, Mich. 7. Jac. debt follows the person of the debtor being by simple contract, and not the person of the Creditor, per Curiam: Also of several Goods in England and Ireland there must be several administrations, and yet administration in Arches extends over all the world but Ireland and York, who have particular Archbishops; but adjornatur. The Court inclined the plea was sufficient.

Bromfield *and* Tiege.

(37) Custom.

IN Trespass the Defendant justifies by custom for drift in a Mannor, and to have recompence, &c. and that thereupon he destrained, whereupon the Plaintiff demurred, because no custom was alledged to distrain for this fine on the marking the Cattle, & per Curiam, he ought to alledge a custom, but in the Case of Teukesbury it was adjudged, that custom to tax for repairing Bridges was sufficient without a special custom to distrain, and Judgment for the Plaintiff, Nisi.

Lucy *and* Levingston.

(38) Covenant.

THat Curteis Clamans titulum by reversal of fine, not sed legale titulum is a breach of Covenant to enjoy against all claiming title under Sir Peter Vanlore, per Curiam on Hub. 35. pl. Tisdel and Essex, the words of the Covenant being pursued, its sufficient whether the title be lawful or not, though damages be more or less, according to the title; and Judgment for the Plaintiff.

Hanſlop *and* Carter. *M.* 24. Car. 2. *Rot.* 478.

(39) Aſſumpſit. ERror of Indebitatus Infra pro diverſis mercimoniis ante tunc venditis, not ſed Infra was diſallowed, per Curiam, Præter Twiſden, who held the Action founded on the contract, and this is Error below, but being after Verdict, Hales Chief Juſtice and Wild ſtrongly that it was not Error. 2. Exception was that the ven. fa. was ſcire for ſciri, which was agreed to be Error below; as to the firſt, the Aſſumpſit is the ground of the Action, and the contract is but inducement, & Indebitatus pro vinis, not ſaying where ſold its well enough, but if any place be alledged that is not Infra its ill, and the contract is only to aſcertain that its a debt by a ſimple contract, not by Bond or Judgment. Judgment Affirmed, Niſi.

Mildmay *and* Cage. Ante.

(40) Sheriffs. IN debt on obligation the Defendant pleads the Statute of 23 H. 6. and that it was alia forma, being to anſwer the ac etiam Billæ, &c. to which the Plaintiff demurs, becauſe bound to anſwer one cauſe in the Writ is ſufficient, and the ac etiam is taken notice of as the courſe of the Court, and if the party do not declare, he is to anſwer but to one; but per Curiam the Writ being in placito tranſgreſſionis, the condition of the Bond to anſwer ac etiam Billæ of 100. l. in placito Debiti is void, being another Writ, but if the Writ were in placito Debiti, or the Band taken only to anſwer the Writ in placito Tranſgreſſionis, it were well enough, and a nil capiat per Billam was awarded.

Dominus Rex and Gregory.

(41) Prerogative. SIR William Jones prayed Judgment on Raſt. Entr. 650. & Kell. 96. & F. N. B. 99. In an action upon the Statute quod Dominus Rex Queritur, which the Court granted, and the ſaying that Memorand. that Dominus Rex venit in Curia Coram Ipſo Rege is but the miſtitling by the Court, and a Reſpondeas Ouſter was Awarded.

Dawſon

Dawson *and* Rawlison.

(42) Tryals.

IN Trespass the Defendent justifieth Arrest quousque Bond given to appear in B.R. absque hoc, that at any time he did arrest without reasonable cause until he gave such Bond, to which the Plaintiff demurs generally, & per Curiam, the justification is good; and the Plaintiff should have traverst absque hoc, that he was arrested and detained till obligation to appear in B. R. having counted that this was taken on Attachment out of Chancery, and a nil capiat per Billam was awarded.

Randal *and* Riddal. *Trin.* 24. Car. 2.

(43) Rents.

IN Replevin the Defendant avowed for the mopty of a Rent, and the question upon demurrer was said by Serjant Hards for the Plaintiff to be, whether a Rent granted out of Gavelkind Lands in Kent shall descend at the Common Law? And he said they should do so, Dower Fitzh. 113. 11. Ed. 3. Dower Fitzh. 85. Perkins 84. pl. 435. as where its a Rent de novo and not by prescription, but the Court inclined strongly that this Rent shall go according to the custom: And 7 Ed. 3. 38. 21 H. 6. 11. the mesnalty ariseth out of the Land, Avowry Fitzh. 150. & 26 H. 8. 4. b. in dissent Br. 59: Also this is the Law of the County & per Curiam strongly. Judgment for the Defendant, nisi; else there can be no true Mannor in Kent and the customs are distinct.

Welch *and* Bell.

(44) Infant.

ERror of Judgment was assigned that the Plaintiff was an Infant and appeared by Attorny, & hoc paratus est verificare, if no further is well enough. And being & hoc paratus est verificare prout Curia consideraverit, &c. in reason its well enough, being but of the same import as the old Entries; and Issue can generally be taken hereon, and Daux and Paitons Case was thus
so the Executors of the Lady Rumny and where Infancy of one Executor reverst the whole Judgment. But in regard the authorities were express contra, that its ill. Adjornatur.

Dunsdale

Dunsdale *and* Isles. *Mich* 24. Car. 2. Rot. 609.

(45) Trespass. IN Trespass the Defendant justifies by distress for Rent of Lessee at Will, the Plaintiff replieth that before the Rent day the Defendant made a Lease for years to begin presently; the Defendant rejoyns that it was agreed, that the Lessee for years should not enter till after the Rent day absque hoc, that he entred before; to which the Defendant sur-rejoyns that he entred before absque hoc that it was so agreed, to which the Plaintiff demurred; and the Court doubted the Lease for years is no determination of the Will without notice, no more than an Utlary, which on 5 Co. 116. b. Olands Case, doth not determin a Lease at Will, without seisure; Also Hales Chief Justice said he had known that Lessor could not determin his will till the Quarter-day, but the Court held this doubtful, and left that to lie a sleep. Twisden inclined the Lease at will was determined, but the rest contra; & adjornatur.

Harlow *and* Brodnox. Ante.

(46) Bar. and Fem. THe Court conceived the averment that the Defendant as Bailiff to the Husband and Wife, did avow for so much Rent arreare to the Husband and Wife was a necessary intendment; the Wife was living, for if she were not he could not avow, but must justifie. But Sir William Jones for the Avowant, said the difference was, that where its for Fealty, Homage or things that cannot be had he must justifie; but for Rent he may distrain: Also ut Ballivus is a good averment alone, though no issue can be on it for want of place; but the parties agreed to amend and try de novo.

Hill *and* Coole. *Friday*, May 9.

(47) Marriage. Vaughan. 302. SErjant Jones excepted against a Prohibition in C. B. on Marriage of his Wives Sister, notwithstanding 18 Levit. 18. upon 2 Inst. 683 having the same reason with those that are forbidden in equal degree 18 Levit. 16. and the same propinquity as the Brothers Wife: Also 19. Canon of Clements Constitut. and the Table of degrees 16 Eliz. expressly mention this degree forbidden, so the Canons 1 Jacobi confirm, and so is the Judgment of Convocation and of Parliament

ment. 25 H. 8. cap. 22. §. 3. & 28 H. 8. cap. 7. & 15. The Wives Sister is mentioned to be prohibited; and Vaughan Chief Justice said that since 32 H. 8. cap. this is a considerable question, but before it was without question unlawful; but the Canons cited are but particular penalties which affirm the Marriage, but Incestuous marriages are null and void, and he conceived it a strange marriage but not void: Windh. Atkins and Ellis grant the Prohibition, For Whart. Biblia Poluglota expounds 18 Levit. 18. not to take a Harlot living the Wife. So not like this Case, and it may be debated after; and the Text imports he should not have two Wives of Sisters together: Also there is no absolute prohibition of Marriage, but only such as Gods Law Prohibited; and a prohibition granted per Curiam. But Trin. 26. Car. 2. C. B. a Consultation was granted after hearing Civilians.

D E

DE Termino Trinitatis

25 Car. II. in B. R. Anno 1673.

Friday, May 30.

Hale Ch. J. & *Rainsford*
Twisden & *Wild.*

(1) Certiorari.

IN C. B. Serjant Baldwin opposed a Procedendo on 21. Jac. Cap. 23. in debt under 5 l. for seisure of Stufs in Norwich of 40 l. value, because the matter was difficult and of such value. But by Vaughan, be the seisure of what value soever, the damage sued for being under 5. l. the Action is below; also this Statute, and Car. 2. were for the Plaintiffs benefit, who shall not be prejudiced by the Stewards or Officers returning the Cause hither on Habeas Corpus, &c. And albeit the Officer hath election to allow or not, yet the Plaintiff shall not be prejudiced: and by Vaughan and Ellis the Cause must be remanded also; and if there be no Jurisdiction the Defendant may have a Prohibition. Atkins contra and Windham, here being a return, and it doth not appear whether it were at Issue or not; and Action upon the Case lieth if the Officer return that he ought not, being a Minister; but Vaughan and Ellis clearly no Action upon the Case lieth, the matter of the Return being Judicial though the Return be Ministerial: And the Clerks said if the Cause be Returned they never sent it back. And the Court being divided, Adjornatur.

Hammond

Hammond *and* Gaap.

SErjeant Baldwin prayed allowance of a Writ of Error without any Bail, being ex debito Juſtitiæ, and not deniable on Judgment after Verdict; to which Atkins Juſtice agreed, and that by the Statute 17 Car. 2. Cap. this is no Superſedeas without Bail, but per Curiam at Common Law the very Writ of Error, eſpecially when entred on Record is a Superſedeas of it ſelf; therefore unleſs Bail be put in, or the Defendant declare that he will not ſtay Execution, no Writ of Error ought to be allowed until Execution be awarded; this Record being removed before the Teſte of the ſcire facias, againſt the Bail in the principal Action, but if the Writ of Error were after the Teſte of the ſcire facias, then on nul tiel Record the Plaintiff may reply, That at the Teſtee of the ſcire facias there was ſuch a Record here, but in neither Caſe there can be no Execution while the Record is removed; therefore unleſs the party render himſelf in Execution or agree, it ſhall not ſuperſede. Per Curiam, The allowance was denied. (2) Error.

Roberts *and* Lloyd, *in* B. R.

WIlliams prayed a Prohibition to the Eccleſiaſtical Court at St. Aſaph, in Suit by two Siſters againſt the third Adminiſtrator for an account on 23 Car. 2. Cap. 10. on Cuſtom of Northwales, That after debts paid the Widow hath one moiety, and the Children the other, and the Cuſtom is triable in the Grand-Seſſions, in rationabili, parte ſed non allocatur, till the pleading and refuſal of the Cuſtom. But Adjornatur. (3) Adminiſtrators.

Mull *and* Warren. *Saturday*, May 31.

MAynard in C. B. prayed a Superſedeas after Execution executed by ſeiſure, and before the ſale of the Goods, upon 2 Rolls 49. §. 5. & 1 Roll. 894. there being a Writ of Error duly taken out before, but the Clerk of the Errors not then in Town it was not allowed. The Court inclined that the Sheriff could not ſell after Superſedeas; but held that before allowance the Court can take no notice of any Writ of Error. But Adjornatur till the Sheriffs Return of ſc. fac. (4) Br. Error. 55. Executions.

Holbage *and* Maycock, *in* B. R. Ante. Hill. 24. & 25 *Car.* 2. Rot. 915.

(5) Infant.

ERror of Judgment in Ejectment that one of the Defendants in Hill. Term appeared, and the same Hill. Term (not sed tempore comparentiæ) was an Infant, and is by Attorny. To which the Defendant in Error demurred generally. And by Hales Chief Justice, and Rainsford, this is substance: and though it were not a special demurrer for this Cause; yet Judgment affirmed.

Witrong *and* Balany. *Monday*, June 2.

(6) Walls *Vaughan* 391.

IN C. B. on scire facias against the Heir and Tertenants; The Defendant after Return of the Sheriff pleads he is not Tertenant; to which the Plaintiff demurs by Say, because upon 3 Cr. 8. 72. Blood's case he is Estopt by the Sheriffs Return. 2. This is a scire facias into a Welsh County, which is well enough to prevent failure of Justice in Execution; though as 1 Co. these Courts shall not be subservient to execute Judgments below, 2 Cro. 484. & 1 Bulst. 54. Hall and Rotheram. 1 Bulst. 156. Bedo and Piper Also Co. Entr. 181. for Dower this Court may on unques accouple writ to Wales, much rather on Execution. Baldwin for the Defendant: The Law and practice hath ever since 3 Cro. 872. been contrary, as appears by Co. Entr. 620, & 622, 623, & 624. where the Tertenancy is traversed: and 4 Eliz. Dier 212. the return upon a Capias is traversed as to rescue, 3 Cro. 859. its agreed the waste is traversable on return of the Sheriffs. 2. Upon Judgment in this Court no scire facias can go the Sheriff of Montgomery, notwithstanding the authorities before cited, which were only where the persons first lived here as the Bail that was put in here, or where there is a fieri facias into any County in England by Testatum it may go thither; and so may an Elegit of Lands whereof trial was in the County adjacent; and suggestion that the Lands are in Wales, and Issue, not triable there. So the Execution in Wales is but a consequent of a Trial in the next Counties; and this is a constant practice. So in a Quare Impedit the Bishop not being subject to the Inferior Courts; but though fieri facias may charge persons that have complied with Judgment here, or appeared here, yet no Authority warrants an Original scire facias against the Tertenants.

nants in Wales on Judgment here. But as Williams Ca. 13. Car. 2. this Court shall not execute Judgments in the Grand-Sessions, and 5 Eliz. Cap. 23. gives the reason why Capias Excommunicatum on Excommengement in Wales lieth not in B. R. because such Capias lieth not into Wales, and so its adjudged expresly Godbolt 214. pl.
Vaughan Chief Justice said in the Lord Bucklies Case it was agreed an Elegit lieth into Wales, and so doth Execution upon a Statute Merchant; and there is no way but by scire facias to gain Execution of the Judgment; which the Court agreed. And Windham said it had been adjudged that as well an Elegit as Execution upon a Statute here lieth into Wales; also that Breve Domini Regis non currit in Walliam is intended of Originals not on Judicials: Also the Court agreed secondly that a General non tenure is not pleadable but a Special non tenure by lessee for years is pleadable, which was so lately adjudged in C. B. for else his possession would be disturbed by Ejectment; and Judgment for the Plaintiff, Nisi. And Robinson Prothonotary said, That by Utlary of a person in Wales, if he appear here, the Court will force him to plead here; which was not denied.

Nitingale *and* Leigh.

IN debt against the Defendant as Administrator, she pleads that 24 Jan. 23 Car. 2. she had first notice of the Action, and that before this she had paid all she had, and hath no assets ultra; to which the Plaintiff demurred by Says, because the Action saith Summonita fuit at York before, and parties and Sheriff being of the same County, she is Estopt to say she was not Summoned having pleaded, and though she were not concluded by this Recital in the Count, yet she is by Teste of the Original Writ in the same County, there never being proof of notice of such Writ to the party: but Dyer 32. pl. the Executor must take notice of it at his peril. And its as hard that strangers must take notice of Execution in the same County, which binds Goods by the Teste into whose hands soever they come after, and Samuel and Pees Case in Ejectment of a House in Middlesex 1658. in C. B. on Special Verdict the Case was argued by Serjeant Says, a Man Recovered by debt in London, and on fieri facias there & nulla bona returned; and before the Teste of the Testatum into Middlesex the Defendant sold his House there, and the sale was adjudged good, being in another County than where the Writ was; but if it had been (7) Administrators.

in the same County the sale would be void; also it will be impossible for to give personal notice to every Executor; also they shall take notice of all Counties, of all Bonds due. Its far easier to take notice of a Writ brought in the same County; and if he be not Commorant in the same County, he may plead it, as 2 H. 4. 21. by Richil and Pl. Com. 279. must intend notice in forein County, so Trin. 21. Car. II. Mellor and Overtons Case in C. B. was adjudged.

2. On the same difference Serjeant Jones for the Defendant, That the matter of the Bar is sufficient; and as to the manner its also good, the first Suit being the Plaintiffs act without privity of the Defendant: and therefore as Hub. 68. Richards the Defendant is not bound to take notice of it. And Pasch. 25. Car. II. Gamp and Smith in C. B. in Assumsit to carry Goods to Hull, want of notice by the Plaintiff of his coming to Hull was held ill being necessary to be to the Defendant, but on presidents adjudged for the Plaintiffs: also if the Defendant were bound to take notice, it were sufficient to file a Declaration; and Summons were needless. And on 5 Co. Mallories Case, lessee shall not take notice of bargain and sale till given; so upon demands and re-entries notice must be given: also till the Writ be Returned its no certain Record, nor the Party cannot find it: and on 1 Eliz. Cap. 7. in 7 Co. 30. its resolved that the Original not Returned before the Kings Demise is gone, being not depending before: also the Sheriff may privately keep the Writ from one Term to another, of which the party cannot take notice: And in B. R. or Exchequor the Executor is bound but by the filing of the Bill on Record; but in this Court there is no Writ on Record till Returned, 2 Anderson 159. Riens enter mayns the day of the second scire facias adjudged good; and Executors Fitzh. 39. and Moor 678. pl. 926. Scarles Case, Administrators Br. 37. and Moor 37. pl. 122. at the Pluries the Defandant pleaded fully Administred before notice, and held good: and it must be intended that the party was of the same County where he was Summoned; and saying she had no notice, is the same as to say she had no Summons; on fully Administra die brevis pleaded want of notice is not material; And 2 H. 4. 27. is that notice must be on non Commorancy; but it saith not that the Executor is bound to take notice of the Writ purchased out of the County, though executed in the same County; but by Summons of the Sheriffs and Assets Br. 4. relies not on the Commorancy: and Mellor and Overtons Case, albeit adjudged for the Plaintiff, the Court inclined

inclined with me; and in Nesbaſton and Solers caſe the Court were of the like Opinion; Vaughan Chief Juſtice ſaid the caſe of Melior and Overton was adjudged for the Plaintiff, though on the various pleading that the Defendant had Adminiſtred before the Writ purchaſed, they inclined at firſt another way, but the reaſons are ſo ſtrong, and the inconveniencies ſo preſſing, if the Executors or Adminiſtrators ſhould not pay after Teſte of the Original, that it would be almoſt impoſſible, for the Executors cannot know of the Writ but in the Office where taken out, and if he doth that, ſtill the party may keep the Original in his Pocket till the Return, and then take out a new one, which would make a vaſt attendance. Alſo 2 H. 4. 27. it was impoſſible the Sheriff ſhould prrcipere the party out of the County to pay Money as the Ancient at Common Law was: and if he pay it not then Summoneas, &c. which is ſufficient notice: but now the Original in the ſame and another County is all one, there being no ſuch Præcipe actually made; but there being other caſes of the ſame inconvenience and yet the Default muſt relate to the purchaſing of the Writ, therefore its not ſafe to alter the Law, and upon that ground Melior and Overtons caſe was adjudged; and upon the ſetlednes of the Law and Practice, the Court were here of Opinion the Executor muſt take notice, which is no greater difficulty then for the Executors to take notice of all the Teſtators Bonds; but yet he muſt do it in Bar to debt on ſimple contract: Alſo in a Præcipe the Tenant cannot plead a general non tenure, but that he was not Tenant die brevis; but the Court conceived it a hard caſe without notice to charge the Executors; 17 Ed. 4, 7. Notice Br. 20. the Court agreed that of voluntary acts they are at the Executors peril, but its hard for compulſary acts to be ſo, and contra to Wade and Atkinſon 2 Cro. 10. it was in C. B. 22 Car. II. adjudged that Adminiſtratio debita forma Commiſſa is ſufficient; and the Prothonotories ſaid, That they did generally plead fully Adminiſtred die brevis, without relation to the Commorancy, eſpecially if in the ſame County, but Commorancy in another County is always pleaded: and this hath been the conſtant Opinion of learned Men. It was ſaid alſo 2 H. 5. that Bond not to uſe a Trade is void, but there is no reaſon at all for it, but a vulgar Opinion. Sed Adjornatur.

Serjeant

(8) Records. SErjeant Jones prayed the entry of a new Record, as of three years since, the Roll being according to custom delivered out by the Prothonotories to the Attorny to enter it, appearing by the Docket and Paper-Book that there was such a Record, sed non allocatur, but on Action upon the case per Curiam lieth against the Prothonotory for delivery out, which is at his peril.

Mudd *and* Warren.

(9) Execution. IT appeared by the Sheriffs Return that a Superſedeas came before Execution, but in truth it came after Goods ſeiſed, and before Goods ſold, but after the Sheriffs had taken ſecurity for the Money, and diſcharged the Execution, & per Curiam a Superſedeas after Goods ſeiſed is a Superſedeas as to ſale, but the Sheriff having received the Mony or taken Security this is not diſcharged by Superſedeas, but the Sheriffs muſt return the Mony into Court. Sed Adjornatur to examine the firſt return.

Richards *and* Cowel, *in* B. R.

(10) Merchants. IN Action on the caſe on policy of aſſurance by Bargain and Sale of 100 l. on three ſeveral Ships, to continue only till any one of them arrive, and two are loſt on which the Plaintiff loaded; the Defendant pleads that one of the Ships arrived with the value of 100 l. To which the Plaintiff demurred, & per Curiam this is no Plea, for the 100 l. is on all the Ships, ſo is not ſaved by the arrival of one, albeit as to that one in which the Goods were it be a good plea pro tanto, and Judgment for the Plaintiff; and if this be available, its in Damages only.

Turvey *and* Thackwel.

(11) Infant. ERror of a Judgment in the Sheriffs Court was aſſigned, That the Plaintiff below was an Infant, and appeared by Attorny for Prochein amy; to which the Defendant demurred, and on Scire facias againſt the Adminiſtrators, return Sciri feci. Judgment reverſed, Niſi.

Error

Curteis *and* Bourn.

ERror of Judgment in waſte againſt the Tenant for years, brought by Baron and Feme of moiety being ſeiſed in reverſion to them and his Heirs ad ex heredationem of them. The Court agreed they muſt joyn in the Action, but the concluſion muſt be ad exheredationem of him; but the Original not being certified its well enough. 2. It was ſaid the Damages is given to Huſband and Wife, which per Curiam is ill, and ſhould have been amended in C. B. before the Writ of Error allowed; but now its too late, and Judgment Reverſed, Niſi. (12) Waſte.

Child *and* Gardiner *againſt* Bloxam. *Tueſday*, June 3.

IN debt for Rent on Nil debet pleaded in C. B. and tried in Hill. Term, & puis Dar. Continuance, the Defendant pleads that one of the Plaintiffs releaſt, and ſo pray the Jury may be diſcharged; to which the Plaintiff demurred, there being no place where the Releaſe was: Alſo Co. Entr. 517, & 518. in a Quare Impedit againſt the Biſhop of Lincoln, it was pleaded that the Patron was dead, puis Dar. continuance, which being confeſt, no farther proceeding was; alſo the Encumbent pleaded a preſentat puis Dar. Continuance with Inſtitution and Induction which was adjudged inſufficient, & Briefe al eveſque awarded being pleaded after the Return day, and before the day in Bank, which the Court agreed; and on 2 Cr. 261. pl. held the want of place here fatal: and on Dyer 36. pl. 10. in Continuance Br. 3. & 3 Cr. 49. pl. 4. the concluſion ſhould be Judgment ſi actio, and not to the taking of the Jury, 1 Brownl. 145. Lane 85. Yelverton 121. & per Curiam, Judgment for the Plaintiff. (13) Abatement.

Aſhenden

Aſhenden *againſt* Sir Chriſtopher Clapham.

(14) Demand. IN debt on Bill Obligatory borrowed and received 100 l. which I promiſe to repay upon demand, on non eſt factum, and Verdict by default for the Plaintiff, Baldwin excepted that there was no Special demand alledged, and a licet ſæpius is not ſufficient. Newdigate for the Plaintiff, That on a collateral promiſe, as Hub. Brown and caſe there muſt be a demand, but between Parties this is a debt, and is ſufficiently demanded by the Action; and to this the Court agreed, That for Mony lent there needs no demand, unleſs the Mony be to be paid to a third perſon upon demand, as upon a collateral promiſe, as 7 Co. Maunds caſe; or where there is a penalty it muſt be demanded Specially: and this being no demurrer, but on Iſſue non eſt factum, the demand is needleſs, Contra by Atkins Juſtice, who ſaid, The debt is not due till demanded according to the Obligation it ſelf; and not like to where Mony is lent, and after a promiſe to pay upon demand: for in this caſe licet ſæpius is ſufficient, yet Judgment for the Plaintiff.

Carpenter *and* Smith. Ante.

(15) POlixphen for the Plaintiff in Banco Regis, on Special Verdict, by which Jane Cappel is found tenant for life, the Reverſion of part to John P. William was ſeiſed in fee of other part and conveyed to the uſe of himſelf for life, the Remainder to John in Fee, and if he die in life of William then to the heir of William: And firſt he concluded the Fee limited to John, and if he die, that it diſcend to the next heir of William doth not make any alteration in the Eſtate of John being no Condition at Common Law, nor no conditional limitation by way of uſe, the firſt muſt be by expreſs Intendment, as Co. Lit. f. 331. in a Feoffment, ſi contingat, makes no condition unleſs the Eſtate be & ſi non; but per Curiam theſe words always in a uſe makes a conditional limitation, and 9 Car. the Earl of Kents and its all one as a limitation till marriage, and if marriage then over which is good enough, ſo Johns Eſtate is out of doors; John and Mary dying before William. 2. As to William its as a Fine levied to the uſe of Conuſor for life, the Remainder to his heir, and the heirs of that heir which are ſufficient words of purchaſe, on 1 Cro. Archers Caſe. Alſo the contingent uſe of the Fee ſimple

simple is an abeyance, as 1 Cr. Chudlies Case, & Dyer 343. Moor 104. as the Fee would have been at Common Law, and the use in abeiance is not executed by the Statute, so the particular Estate of William is not destroyed by accession of the Inheritance, because first no Fee simple resorted to William, for by the Fine the whole Fee simple was in the conusees and could not come out but by the Statute of uses, and the use for life being executed in William. and the rest in abeyance doth not draw any Estate, out of the Conusees nor doth it resort by Implication or construction, but by a future use as to the last Will, or after the death of J. S. the Estate remains untouched in the conusor, as in 1 Cro. 154. & 1 Leonard 194. Lord Pagets Case, until the futurity come in esse. Every owner having the Estate, and use distinct, and may convey one and retein the other, and where no present disposition is made, the Estate remains not by reflection, but by the old Estate as Feoffment to the use of the Feoffor, remainder to J. S. in Tayl, the Remainder to the Heirs of the Feoffor is a void Remainder to the Feoffor, so 3 Cro. Fenwick & Mitford hinder not the Case in Question, which is by way of contingent use, and at the Common Law though the Intent be never so plain, no use will rise but by express words, 2 Roll. 837. Nevils Case and 1 Co. Corbets Case, & 1 Cr. Seagood & Holmes; Also here is no intent any use should resort to the Conusor, nor can there be two uses on foot together in esse, Co. Lit. 271. and here the use to the heir and the heirs of the heir is a use in esse though in abeiance, as the Freehold on occupancy, so there cannot be any other use to William and his heirs, but per Curiam this is labor in vain, as in first resolution, 11 Co. 80. in Lewis Bowls use, the use must be somewhere, therefore doth revert. But 3. this Fee in William is but by construction of Law, which shall never prejudice any other Estate which the merger here must do, and 11 Co. 80. Lewis Bowls Case, therefore shall not be merged: Also the lease and release by William after doth not destroy the Estate of Wil. though a Feoffment would as 1 Co. Archers Case for as Co. Seymors Case, lease and release destroyed no Estate nor passeth no more then he may without prejudice to others, but as the releasors Estate was subject to the contingency, so is the Releasees, as 1 Co. Bredons Case, where if the Conusee had least and releast to J. S. he would have had no greater Estate than the Conusor had. 4. The future use of that part whereof Jane Capel was tenant for life by the Fine of William after her death, on Winch 61. Bukle & Symons Case, and Weal & Lowers Case in Chancery, 1 Cro. 99. & 3 Cro. 439. is not

destroyed by destroying the particular Estate of William, because it dependeth not thereon, and the Conusées cannot destroy it, nor is it disturbed here being no Disseisin, Feoffment or Alienation without notice as 1 Co. Chudlies Case, Dyer 340. nor turning any use to a right, nor the Estates of the Feoffées displaced, as by the Release of William nothing had been devested out of Feoffées before the Statute nor since.

Levins for the Defendant. 1. The Estate that William took was for life, expresly of what was in possession, and by Implication for life of what was in reversion: and 1 Inst. 22 no matter whether it be the old or new use; and this is Fenwick and Mitfords case, Moor pl. 437. 3 Cr. and Leonard and so it was held in Bipus and Mitfords case. And 1 Leonard 10. pl. 5 Leon. 296. pl.

Also 2. the Estate limited to John was a base fee; and another fee over upon contingent springing uses 1 Cr. Bolton 3. The Estate in William on this limitation to the Heir of John and his Heirs, doth revest in William notwithstanding 1 Co. Archers case, which was to the Heirs of the Body of the Son, as 1 Roll. 233. §. 4. and not to the Heirs generally. So 1 Co. Shellies case, and 2 Roll. 253. §. is a limitation over, as here which reverted; but the Court denied this. 4. The lease and release admitting the Heir, a purchasor doth destroy the contingent use; the privity 1 Co. 136. being destroyed, and no possession remains to support the use; 2 Roll. 796. Wig and Villars the same with the Lord Cooks case, Godbolt pl. a grant of a reversion was held to destroy, but that it recited the particular limitations; and Moor pl. 1018. & 2 Cr. 168. Winston and Bouls case, a Lease for years destroys the Execution of the use. And though it do not destroy, yet 5. This release doth hinder the rising of the use, till the Feoffées re-enter to revest it; for till William died the whole Estate was transferred, and the Feoffées were not seised, nor could not enter, nor were privy. Hales Chief Justice said, The Plaintiff could not have Judgment in Title only to the later part, unless he had Title to all; its plain the limitation to William is a good contingent, taking effect within the compass of one life: viz. if John die, William living. Also 2. The Heir Pasch. 1651. Pausly and Lowdal, and Pasch. 18. Jac. Egertons case is adjudged a purchase, but if it had been proximo heredi, or to the Heirs of William without going over, the Heir is the root, and nothing is in the Ancestor; Also on 11 Co. 80. Lewis Bowls case, the use

in

in abeyance is not in Feoffées, nor in nubibus, because there is no body to take it, therefore must resort back to William. 3. The Lease and Release, though it do not devest the Remainder, yet it confounds the particular Estate, which doth as much destroy the contingent as a surrender of the Tennant for life before the contingent happen; however the particular Estate fall by death or otherwise, the contingent is destroyed; otherwise many settlements would be shaken on this reason, 1 Cr. Pigot and Smith; fine by the Tennant for life, and he in remainder destroys all contingents; but bargain and sale by a bare Tenant for life would not destroy. 4. As to the other part, it depends not by way of Remainder, nor ariseth out of the Estate of William, as Fenwicks case was; but as 9 Car. 1. Earl of Kents case and Ventris case this was a future contingent use that could not be destroyed by Feoffment of William, nor doth his Lease and Release suspend it; because as Sir Edwards Cooks case, Godbolt it doth not appear that this was upon valuable consideration, nor no notice, so being by grant a Fee simple passeth, determinable when the contingent happens.

Twisden Justice conceived the Lease and Release do not destroy the contingent, in regard the same privity remains, the Release being without valuable consideration, and the Freehold is not disturbed; which by Wild was agreed, where the use is in gross, as upon Janes part; but contra where the use is on contingent Remainder, as in Williams part; as on conveyance by A. to B. for life, the Remainder to the next Heir, or first Son of B. and his Heirs; till B. hath a Son the use returns to A. And by surrender of B. the contingent is destroyed, and Garret and Blizards case it was agreed, That by a confounding of the Estate for life, though the seisin be not disturbed, the contingent is gone. So Hales Chief Justice and Wild being contra Twisden. Adjornatur.

Jennings *and* Clenial. Hill. 22, & 23. *Car.* 2. Roll. 222.

IN Trespass of breaking his Close, called Jennings Key; The Defendant prescribes that omnes Legei Domini Regis time out of, &c. used to land Goods of too great Burthen in the Lands adjoyning; and for the Plaintiff Verdict was, & per Curiam the prescription is good enough on exception in arrest of Judgment, and a Nil Capiat was awarded; (16) Prescription.

but on Certificate of a Court quod habetur time out of mind Quædam Curia de recordo, not said by him, and his predecessors, is ill.

Willoughby *and* Skinner. Pasch. 23. *Car.* 2. Rot. 144.

(17) Bankrupt. IN Trover of Goods, value 500 l. of which by wrong the possession was Denego's, who became a Bankrupt, and sold to the Defendant, and then the Goods were recovered from him, then a Commission was sued out, and the Mony assigned to the Plaintiff on Special Verdict; Barwel for the Defendant conceived the Goods being the Kings, and sold by Denego to the Defendant wrongfully the moiety was not due; & per Curiam Judgment for the Defendant.

Cockam *and* Hale.

(18) Tithes. THE Queen Grants a Messuage and all her Tithes in B. thereunto belonging and used; and it was found that no Tithes were demised: on Special Verdict the Court conceived the Tithes passed not; Also several bargains and sales are said Debito modo Irrotulato; not said in six months; which is well enough in Verdict, but not in a Plea: and Judgment for the Plaintiff.

Wilson *and* Robinson. *Modern Rep.* 100. *pl.* 5.

(19) Devise. DEvise of all his Tenant right Estate in Brigend to I. S. on Special Verdict was conceived by the Court to pass a fee; notwithstanding Wilkinson and Mervels case 1 Cr. 447. in Devise Fitzh. 20. being as Devise of all his Copyhold Estate or Freehold Estate which passeth fee, so of all my Estate in the Tenant-right: also at the end of every Devise there is a Rent granted for ever, but being joyned in Devise with all those Lands taken up by the Father of the Devisor of the King, and all Houses, &c. belonging to the same, its doubtful; Et adjornatur.

Cole

Cole *againſt Tertenants of Forth.* Paſch. 25 *Car.* 2. Rot. 392. Ante.

ON Scire facias, Quare executionem non, on Error of Recovery in waſte; The Defendant pleads in bar quod executio non, and concludes quod breve caſſetur: and now the Defendant prayed Execution; which was granted upon two Preſidents on demurrer to ſc. fa. where Execution was awarded: alſo upon Shalmers caſe in debt on obligation in London; the Defendant pleaded it atoſe in Eſſex, and prayed the Attorny that the Plaintiff might be examined, not concluding in bar or abatement; to which the Plaintiff demurred in abatement; the Defendant joyned, ex quo ipſe ſufficientem materiã in Barra allegavit It was adjudged a plea in bar, the plea was quo ad ſenſinam that the Writ was inſufficient, and the Writ being only againſt the Tertenants, and not againſt the Adminiſtrator for the damages, Execution was awarded per Curiam; but Hales Chief Juſtice ſaid, Had it been to have Execution againſt the Tertenants, and alſo damages againſt the Defendants Adminiſtrator, it had been only anſwered in part, and ſo Judgment of Execution would be Error; it was alſo agreed that whether plea begin in bar, and conclude in abatement; or begin in abatement and conclude in bar, the plea is in bar. (20)

Foorth *and* Walcot. *Wedneſday,* June 4. Ante.

THE Defendant not having pleaded the Statute of 23 H. 6. Cap. 6. the Court conceived the plea ill, but it might be pleaded that the Bond was by Dures Br. 19. Dures, being in other matter than the Statute allows; alſo the Statute makes the Bond void for the whole; but Judgment for the Plaintiff, Niſi. (21)

Menlee *againſt* Guy *and* Lloyd.

ON Utlary after Judgment in debt on Obligation, the Plaintiff being diſcharged before in Yorkſhire by the Juſtices as to the debt, on the Statute 23 Car. 2. Cap. 20. §. 4. but the Defendant agreed to pay 1 s. 6 d. per week; and this being withdrawn, the Plaintiff prayed a Superſedeas here of the Utlary, to effect his diſcharge, being by Habeas Corpus removed (22)

removed by the Defendant; which regularly cannot be without satisfaction; & per Curiam, nothing can be done compulsary but by compromise, for the agreement to pay will not amount to a discharge as to the party, though the Utlary be pardoned as to the King; nor can the Justices below discharge him now being removed. Sed Adjornatur to mediate.

Dixon *and* Hanley, *in C. B. Thursday,* June 5.

(23) Assumpsit.

IN Action upon the Case on Assumpsit, in consideration the Plaintiff at instance of the Defendant would change two Heifers with the Defendant, he assumed to pay 20. s. And another Assumpsit in consideration the Plaintiff had changed at the Defendants request two Heifers with the Defendant, to which he pleads tender of the 20.s. not said when, so it might be after the Action brought. Also 2. its said the several promises, if made, were for one and the self-same cause and exchange, which is no traverse nor confession, nor is there any averment to make it good; therefore on demurrer the plea is ill. Newdigate for the Defendant waved the plea, but excepted to the Declaration, that there is no time of the exchange, nor any request, nor any averment on the Assumpsit that he would or that ever he did exchange; and the other is executed, so no consideration, and these shall intend several exchanges. The Court also agreed the Plea ill, and also the Declaration as to the first promise, it being intended several exchanges,& dicit quod excamsit, not said when, or in consideration of,or relying upon the promise, is no sufficient averment; but the later promise is good and needs no averment: Also on 3 Cr. 888. obtulit se to pay, needs not, so it be pleaded he was always ready, and yet is to pay, and brings the Mony in Court; but Judgment for the Plaintiff as to 20 s. and full costs being on demurrer.

Sir Henry Journinghams *Case.*

(24) Nontenure.

IN sc. fa. against Tertenants, he pleads non tenure, and on 3 Cr. 872. prays the Plaintiff may take Judgment or reply; which the Court granted, and said that to Special non tenure he must reply and not take Judgment, ex motione Brown.

Twiford

Twiford *and* Buckley.

DEbt on Obligation, on Oyer, the Condition was if all the Articles of the Defendant in an Indenture between the Plaintiff and the Defendant be performed, the Bond to be void; The Defendant pleads at the time of the Articles he was able to make a Lease before Michaelmas for three lives, discharged, but the Plaintiff did not name the two other lives that were to be inserted; to which the Plaintiff demurred, because the Plaintiff hath time to name during his life; also the possession is to be before Christmas, which is not done: The Court inclined the later a breach, but the Lease per Curiam cannot be made before the Plaintiff have named the lives; and the Plaintiff cannot alledge breach in not making Lease unless he names; 3 Bulstr. 168. pl. 72. also the Lease is on such Covenants as the Plaintiff or his Counsel shall advise: so the Plaintiff must tender the Lease; also quod potuit make a Lease is a sufficient plea, being with reference to a particular incumbrance: Godbolt (25) Condition.

Et adjornatur.

Wilson *and* Dove. *Friday*, June 6.

IN Assumpsit on consideration that the Plaintiff would deliver up a Bond, the Defendant promised to pay 3 l. Interest to William Ayer to the use of the Plaintiff, or satisfy him if he do not make it appear he had so done; the Defendant agrees the promise, but said he paid the Mony, and notice to the Plaintiff & constare fecit to William Ayer; to which the Plaintiff demurred, specially that this amounts but to the general Issue. The Court said, That were the Assumpsit for Mony, payment before the Action were but the general Issue; but this being for not making appear, this is not the general Issue: but here the Defendant ought to make it appear, being particular of payment to W. but to make appear generally is intended by the Jury, and so may be in the same Action; also constare fecit by telling him he paid it is not sufficient, but he must shew how: viz. whether by Acquittance, or Testimony of Witnels, such a constare that ought to satisfie him. So Manfers case and Hub. 92. pl. 125. in Gould and Death. 2. This is a promise to pay 3 l. for Interest Mony; which by Vaughan Chief Justice lieth not, for at this day 13 Eliz. Cap. 8. §. 5. though (26) Assumpsit.

though there be Laws in excuse of penalties, yet none that do make the taking Interest Lawful; but the other three Judges contra; but all agreed the constare fecit, unless it be said W. A. was satisfied with it, is ill; and Judgment for the Plaintiff.

Peak *and* *Saturday*, June 7.

(27) Trespass. IN Special Action upon the Case for Battery of Servant per quod servitium amisit: Barwel prayed Costs without the Judges signing the postea, that the Battery was well proved; & per Curiam, it was granted in B. R. on 23 Car. 2. Cap. 9. §. 149.

Thomas *and* Sorrel. Ante.

(28) Wine. IN the Exchequer Chamber Baron Littleton as a general rule agreed, the King may dispence unless the thing be pro bono publico, or malum in se, or absolutely prohibited by Statute, as Lit. Co. 128, and 2 Roll. 179. 3. Inst. 174. Hub. 75. and this is not of the nature of either of those, nor ever declared a Nusance, as new Buildings were; and therefore 9 Car. 1. in the Star Chamber on 35 Eliz. Cap. 6. which was an obsolete Statute, were held, they could not be set up; also this is no delegation nor transferring the Prerogative but a Dispensation, which is an exercise of it, and the like Charter to the Borough of St. Asaph, this was held good; also this is only to a company; so not so large as the Case of Waterford, which was to a whole Corporation; yet Moor pl. is held good, and the King, though he may discharge of Pisage, cannot grant it; neither is the generalty of this any repeal of the Law it self; also Charters of Exemption are as large and mischievous; yet always allowed. 2. This Charter binds the successor, and 3. The proviso is set up by the late Statute, and in omnibus agree with Atkins for the Defendant; because this Charter was for support of the Vintners, and had it been void would doubtless been repealed in Parliament. 12 Car. 2. & 21 Eliz. Cap. when there were particular debates therein, and provisions made against Monopoly Patents; this Charter is suitable to the rules of 7 Co. 23. being utilitate pensata in maintenance of the Seamen, and in preserving the Corporation of Vintners; as to the Cases of Wright and Mason and Norris and Ryder, they were stirred on the Case of Monopolies, so needed no new Arguments, therefore passed so sudden without argument

argument 11 H. 7. 12. saith the true reason of the Judgment, in the Case of Waterford was only because it was malum prohibitum. 2 Wild Justice of B. R. Necessitas quicquid cogit excusat, so could say nothing new, but conceived, 1. This was a good Grant in the creation. 2. Its not gone by death of the K. 3. The Proviso in 7 Ed. 6. doth preserve against 12 Car. 2. and so Judgment ought to be for the Defendant, this being for the encouragement of Trade, against which the Statute 5 Eliz. cap. 4. was held by Keel. Ch. Just. fit to be repealed; and all Stat. or grants that are against Trade, are structi Juris, as for incouragement are favourable; Trade being as in the circulation of the Blood, the least obstruction puts all into disorder: and there are voluminous Laws for regulation of Drapers, Tanners, Lawyers, &c. against enormities therein: but these do not derogate from the legality of the Trade or profession: also Stow 609. Aintners were Incorporate by Ed. 3. Also setting up in By-places and Allies were punishable at Common-Law; and are so now in London. And as Inns and Ale-houses may be suppressed notwithstanding his Licence: Also the restraint of the Statute is general, not for the particular mischief of by-lanes; and none would be Prentice to the Trade unless when he were free he might set up: Also from 19 Eliz. ever since it was never questioned, but that this was a good grant; and renewing Charters are but to shew respect to the new King. Also the more buyers the better encouragement is to the Merchant to voyages: also the King may dispence with any Statute where the penalty is popular, for all Statutes are for publick benefit: and 2 H. 6. cap. 7. for prohibiting Sheriffs, and F. N. B. 222. G. the Statute of Mortmain, and 14 H. 6. cap. against Transportation of Wooll, was for publick benefit, but the people were not concerned in the interest: So 4 H. 7. cap. 6. therefore the King may dispence: 2 Rolls 170. Prins Records 115. also 7 Ed. 6. was dispensed with, 3 & 4 Ph. and Mar. Dyer 270. & Trin. 15 Jac. Bridgman 113. the Kings power is not questioned, but the wording of it: also the justification in Sir Walter Rawleighs Case was under him as assignee, not under the Kings Patent immediately. And in Young and Wrights Case there was a rule for Judgment, though the Roll be wanting: and there is more reason to dispence with Corporations than with particular persons; Corporations being subject to the same oppressions, and all the Corporations are before the King when made, and it consists of particulars, and none fitter to be a Aintner than a Aintner. 27 H. 6. Cap. 2. Rast. Stat. of Woolls, and 8 H. 6. 19. & 14 H. 6. cap. 2. & 5. were pro bono publico, yet

disposed with, and the construction must be now as the law was 9 Jac. without regard to the mischiefs of the revenue since, for the King never had this revenue; also multiplication of persons in every Trade destroys it, therefore they cannot be presumed to increase the numbers, 23 H. 6. Every Corporation elects their Mayors, yet this makes them not Justices, but the Kings Grant; so 49 Ed. 36. those that are Freemen in futuro, shall be exempt of Toll; also the place is not exempt, but the Vintners in it, the privilege is all over England. The third point depends on the legality or illegality of this. As to the second point all powers and Commissions determine by the Kings death; so Stanf. prerog. 30b. of licence of alienation, but this Charter only restores the ancient liberty that was taken away by 7 Ed. 6. so to be favourably taken. 2 R. 3. 4. F. N. B. 223. working as a restitution, and so both concluded for the Defendant.

Foul *and* Baker *and* Uxor *against* Doble.
Monday June 9. *In* C. B.

(29) Bar. and Fem.

IN a formedon in Remainder of a tenth part of Land in Ickleson in Sussex, that Farchard was seized and Infeoft Collins, to the use of feoffor, for life, after to the use of Peter, Jane and Mary, the Remainder to Lucy and Ruth the demandants; the Defendant pleads as to parcel, nontenure and that Quidam Rich. Ro is and ever after was Tenant, to which the Plaintiff demurs, as to residue the Defendant pleads a Fine and Warranty by Lucy and Ruth, to which the Plaintiff replies that the demandants were married at the time of the Fine, to which the Defendant demurs; and by Wilmot for the Plaintiff nontenure is good only for that part, and not specified, in which Town its ill, 33 H. 6. 51. the demand being of Lands in several Towns. Thel. Digest. 241. b. The Sheriff cannot tell of which to give Seisin. 2. Its said R. Ro is & eodem die (which must be die brevis) and ever after was Tenant, which on Brief Fitzh. 828. its ill. 3. As to the plea in Bar, the Fine per nomen is ill, as 1 Leond 115. being of a fourth part, not saying in how many to be divided Pl. Com. 161. & 3. Cr. Gray and Child. 2. The fine is of a 3. part per nomen of a third part, and albeit Trin. 13 Car. 1. in Exchequer, Vermudens Case, a grant of 1016. Acres per nomen of a fifth part of 7000. Acres, this was aided by saying both were the same, yet here there being no avermentis ill, as grant of a 3d part, habendum a fourth part. 4. As to the Warranty by Baron and Fem, on death of the Fem with Issue

Issue, it Bars not the Sister, being determined, as Lit. Sect. 743. & 9 H. 4. 8. 44 Ass. 25. 3 H. 7. 9. but however it never attached on the demandants the husband being yet living that joyned in the warranty 29 Ass. 34. and if it doth, yet this warranty works no discontinuance to the Sisters, as 3 Cr. 602. Keen and Noy 66. & 1 Cr. 156. Salwin and Clerk 1 Inst. 380. and Symors Case 10 Co. they being Tenents in common 1 Inst. 186. A fine puts not out of possession, as 3 Cr. Hemsley and Brights Case, 3 Cr. 186. & 689. & 12 H. 8. 9. Eines Br. & 13 Ed. 3. Garranty, Fitzh. 24 & 25. Also the fine is but of a fourth part, so the warranty shall not by implication Oust of more. 5. The conclusion of the plea is, Judgment if against the fine and warranty, ad quod se tenet, the Plaintiff shall have Judgment which is by Estople, 27 Ass. and waves the warranty, so reacheth not the Plaintiff that is in Remainder. Baldwin for the Defendant demurred upon the discontinuance that it works as a warranty, Ellis Justice held the warranty shall not survive, but when Baron and Fem warrant against her heirs 3 Co. 14. Sir William Herberts Case, the warranty survives to the Husband, who hereby hath the Feesimple, so cannt Rebut. Sed Adjournatur.

Sir Oliver Butlers *Case.*

(44) Bar. and Fem.

Serjant Baldwin prayed Prohibition to the Arches in suit for Alimony, having there proved a settlement by Sir Oliver to Sir Ed. Turner, &c. Trustees by her consent as party to the Deed of 500. l. per An. to allow her 300. l. per An. separate maintenance: The Spiritual Court having disallowded this Plea, sed non allocatur this being only a truss, this Court can take no notice of it, but the Chancery: Also this maintenance may be too small for the Estate and port of the Husband which is the measure thereof, and a Prohibition was denyed, the Spiritual Court having allowed 400 l. per Annum.

Bold *and* Rice *in* B. R.

(45) Executors.

IN a sc. fa. with enquiry of Assets and Wast found and returned, to which the Defendant pleads a former Judgment ultra quod, &c. so plene administravit, to which the Plaintiff demurred, especially because the Wast is not traversed, which is the point of the Enquisition, & per Curiam, it ought to be traversed albeit on a sc. fa. on a Judgment plene Admnistravit be a good plea without traverse of

the ſuppoſed Waſte in the Count; but here the Waſte, being returned, otherwiſe. Sed Adjornatur.

Harvey *againſt* Oldfield Brodnox.

(32) Diſtreſs. IN Treſpaſs the Defendant juſtifieth diſtreſs for Rent out of this and other Cloſes that lay open to the diſtres, to which the Plaintiff demurred, and the Court conceived that entring per viam apertam, incloſure may be broke. Sed adjornatur.

(33) Warranty. IN an action of Covenant upon Conceſſi & Feoffavi in a Conveyance of an Inheritance, breach was aſſigned in entry upon the Plaintiff, to which the Defendant demurred; and whether Conceſſi make a warranty or Covenant in Caſe of Inheritance, as it doth on a Term was the queſtion. The Court inclined it would not, on Hub. Sed Adjornatur.

Barns, *&c.* *and* Harvey.

(34) Joyndure. IN Treſpaſs by three for beating them and taking away their Netts; the Defendants juſtifie joyntly, under the City of London, as to the Battery not Guilty; and as to the Netts and reſidue a ſpecial plea; the Plaintiff demurred & per Curiam its ill, counting as to the Battery, though for the Netts its well enough as to the ejectment of Land and heir, had the Defendant pleaded ſeverally one plea to the Battery and another to the Netts, by a Nolle Proſequi as to part it had been well, but here the plea and replication is joynt, and being not after a Verdict the Court cannot divide it, and judgment for the Defendant: and in this Caſe it was ſaid by Hales Chief Juſtice that in Information againſt the Waterbailiffs of London by Quo Warranto, to know why they claimed to convict on bare preſentment and they preſcribed ſo to do, that the preſcription was adjudged void and their liberties ſeiſed; every nuſance ſhall be traverſed before the party can be convicted, either in Leet, Foreſt or other ſuch Court, and Eſtreats on ſuch preſentmens are void, and were all ſtopt in the Exchequer.

Boulton

Boulton *and* Camam. *Mich.* 25. Car. 2. *Rot.* 353.

(35) Executors.

IN Covenant against Executor on express Covenant by Testator for him, his Executors and Administrators on demise to the Testator: The Defendant pleads fully administred; to which the Plaintiff demurred. Contra Dyer 324. That the plea is ill and contrary to Hub. Collins, and this being for arrears in the Executors time, it was for the Plaintiff said the Judgment should be de bonis propriis as well in Covenant as in Debt. Sanders Contra, that the Defendant cannot traverse his entry into the Lands demised. 2 Cr. 271 Bridgman and Bendloes Case 134. Also in action in debet & detinet, an assignment before the action is pleadable in Bar, which is here pretended: also the declaration is against the Defendants as Executors, and the plea of one taken as Executor, and of the other ne unque Executor, which is an Executors plea; and to this Hales Chief Justice, and Justice Wild agreed, that Covenant will bind Executors, and an Executor is as an Assignee as grounded on the deed; but if breach happens not while he is assignee but after his assignment, then it must be against the second assignee, the Executors are liable to Rent encurred before assignment in their own right, but after assignment only as Executor. 2 Cr. Bret and Cumberland, so its not like to debt which as Co. Hargraves Case may be in debet & detinet or at election in detinet only according as the Rent is more or less worth than the Land, and so adjudged and in Heliar and Casebrooks Case it was adjudged in debt on the same difference: also had the Testator assigned, the Executor might in debt or covenant plead nil debet or fully administred: also on fully administred Evidence may be given of any other part of the Testators Estate beside the overplus of Rent, and if there be Judgments it was the Plaintiffs folly to charge them as Executors, so in Covenant to repair where assignee is chargeable so long as he hath possession, if it be brought as Executor Judgment shall be only de bonis testatoris: also Rent is allowed before all other debts, because its distrainable. Twisden Justice conceived this no plea in covenant, being charged as well for the profits as the overplus, therefore the Defendant should have pleaded specially that the Land was worth but so much, ultra quod, no assets. Sed Adjornatur.

Manel

Manel *and* Coltloe, *&c.*

(36) Bail. IN sc. fa. against Bail the Plaintiff declares as Executor on action here, and that the Defendants were Bail, that the Plaintiff did recover, and that afterwars the Plaintiff died, the Defendant not brought in by them; the Defendant pleads there was by Testator no Capias sued out; to which the Plaintiff demurred, because its said the Plaintiff, the Testator did not sue forth a Capias, and doth not say that the now Plaintiff his Administrator had not sued forth any; sed Curia Contra: That is a good plea to common intent here, because the Plaintiff cannot have Capias without a Sc. fa. and if the Defendant principal dye before Return of Capias the Bail are discharged; but not so on death before a second Sc. fa. 2. The Sc. fa. was to shew cause why execution si sibi viderit expedire (not said) fieri non debet, which per Curiam is ill, and if the Writ be so it is not amendable, but the Plaintiff must discontinue.

Aier *and* Rushton.

(37) Replevin. IN Replevin the Defendant avows damage feasant, the Plaintiff in Bar replies that after taking, and before delivery of the Catle to the Plaintiff he tendered amends; to which the avowant demurred and Judgment for the avowant, this tender being too late after impounding.

Grove *and* Smith. *Tuesday*, June 10.

(38) Bankrupt. ON motion of Mr. Thompson to make Rule at Guild-Hall, a Rule of Court, it was said by Hales Chief Justice and the Court, that payment by debtor of Bankrupt to himself or to his Creditor before notice of the Bankruptcie, and before the Commission sued forth, is a discharge against the Commissioners or their assignee, Quære of payment after the taking out or Teste of the Commission, and before notice. Inter Garrard and Langston Mich. 24. Car. 2. and he was discharged accordingly.

Pascal

Pascal *and* Error *Br.* 55. *In* C. B.

(39) Execution.

SErjant Brown prayed money out of Court, being taken in execution after a Writ of Error taken out, and notice thereof to the Plaintiff on a Nonsuit in a Replevin, but never allowed by the Chief Justice, nor delivered to any Officer in Court, & per Curiam till the Roll be marked, or the Writ delivered unto the Officer in Court, its no Supersedeas, especially after the return of it, which was out last Term, and the last rules were discharged.

Twisleton *and* Dunkin. *In* C. B.

(40) Sheriff.

DEbt on Sheriffs bond to appear at Westminster in Chancery, ubicunque, &c. Cras Trin. to answer de Contemptu, and to other things to be objected: On Dyer the Defendant pleads the Statute 23 H. 6. cap. W. and that this is alia forma, the attachment being to appear in Chancery ubicunque, &c. the Court conceived the Bond well enough, it being at Westminster ubicunque, 3 Cr. 862. which is all one as in Chancery, ubicunque in Westminster which is well enough: Dyer 119. pl. It not being said at large ubicunque tunc fuerimus in Anglia 2 Cr. 286. pl. Villars and Hastings, additions more or less, unless in points material it hurts not, Dyer. 364. pl. 3 Cr. 466. Corbet and Coke, And here the party is not confined to any place, but to the Court, which is ubicunque, and so the word Westminster is void, as the word then and there have been ruled, and notwithstanding Stiles 234. pl. 538. Burton and Loe Pasch. 1650. Rot. 47. and Blands Case 3 Leonard 86. this was held well enough. And the Bond Secondly being to the Plaintiff as Sheriff, albeit the Declaration be on Bond to the Plaintiff as Esquire, not said tunc Vicecom. yet on Dyer, only the condition is entred and not the Bond, so no advantage can be taken against the Bond unless that were entred, Notwithstanding 3 Cr. Guybon and White, Judgment for the Plaintiff nisi against President of Compton Stiles and Twisleton and Godfery in B. R. where on Dyer only the condition was entred, and for want of tunc Vicecom. in the Declaration it was held void, and Ellis Justice and the Prothonotories said it was here, but afterward Judgment for the Defendant on the first exception.

Thread-

Threadneedle *and* Lyneham. *In* C. B.

(14) SPecial Verdict in Ejectment, that Hall Eveſque Exceſtre ſeiſed in Fee of two Mannors, both of Demeſn and Copy, and demiſable for three lives which were anciently Leaſt together and let part to Chitty; and ſo by former Biſhops and now to Prouſe, for 67. l. per An. who let for years, after the Leſſee ſurrenders to John Biſhop, excepting the part excepted in the ſurrender, who for 90. l. per An. Leaſes both Mannors except, &c. and 5 Ferms to Noſeworthy at the ſame Rent; which is confirmed by Dean and Chapter; then the Biſhop dies and the now Biſhop is Leſſor of the Plaintiff, and would avoyd the Leaſe to Noſeworthy on 1 Eliz. 19. Newdigate for the Plaintiff. 1. That its made during another Leaſe of part in being to Chitty. 2. Here are five Ferms excepted out of the Leaſe, that were anciently leaſed. 3. Here is no effectual reſervation, as Co. Lit. 44. & 10 Co. 6. and he relied upon Moor 94. pl. 213. Lit. ſect. 83. becauſe the preſent Biſhop hath not the Land in the ſame plight: Alſo this is a Leaſe made by force of a power given by Act of Parliament, and 6 Co. 33. Fitzwilliams Caſe, this muſt perſue all circumſtances; 3 Cr. 5. & 1 Leonard. 36. & 3 Leonard. 30. pl. 18. & 5. Co. 2. Elmers Caſe, and Moor. 253. pl. 400. & 875. As to the ſecond, this doth not perſue the ancient demiſe, 5 Co. 5. Montjoys Caſe, Lit. Co. 4. non obſervata forma preſcripta by the Statute perit materia, as 2 Inſt. 283. on W. 2. cap. 13. Alſo now the ſucceſſor hath not ſo beneficial remedy by diſtres, for no values being found, that which is excepted may be more than that let, and what is excepted is diſcharged of the Rent and remedy for it which on 32 H. cap. 28. is ill, and the Succeſſor hath no remedy againſt the firſt Leſſee for life; and by ſuch exception the ancient Rent may become remedileſs, if the whole be reſerved out of one Acre, and Leaſes by this may be multiplied as a Banbury Cheeſe into a pairing, and Moor. 108. pl. And the Caſes of concurrent Leaſes makes not againſt this, being ſtill of the ſame Lands, and Mich. 22. Jac. Foſter and Woods Caſe. A Biſhop that had let a Mannor uſually let, doth after let one Cloſe upon the coming of the Mannor into his hands, he may again demiſe the Cloſe with the whole Rent, which is true only in caſe the leaſe at firſt of the Cloſe was above a 11 year: and that many Biſhops have thus divided leaſes is but fact, and on under-leaſes generally there are covenants to ſurrender, that a new leaſe may be taken; not that the leaſe is void, but only voidable, which may be confirmed by acceptance

ceptance 1 Cr. 23. Smith and Moor 778. pl. 1078. the remedy is not sufficient by contract as in lease for years of Tythes, but it must be upon the lease it self for life which is void, so is 1 Cr. 47. Leighs Rep. 74. also 2 Cr. 453. Windham and Atkins conceived this reservation of the whole Rent out of what is let, and excepting part to go to the Successor is well enough 2 Brant. 211. b. But Vaughan Chief Justice and Ellis contra that this is not the ancient Rent, being not out of the whole, nor so beneficial: And the whole Court inclined this was not so beneficial as to remedy. Sed Adjornatur.

Dominus Rex and Brown. *Friday*, June 13.

(42) Women.

He was indicted on the Statute 3 H. 7. cap. for forcibly taking away and marrying the Daughter of one Sommers a City Orphan, in the custody of the Chamberlain, & per Curiam, the child her self being about 14 years old was held a good witness to prove the fact, and the Evidence was that she was of substance, worth 5000. l. that she was menaced by the Defendant, then in a Vizard and carried away in a Coach to Westminster, and the next day, by her own consent; but caused by the precedent menace, she consented to marriage, but was not defiled being surprised that day, and by direction of the Court the Defendant was found guilty, and the next day had Judgment to dye: and 39 Eliz. cap. 9. was also read; and the Tuesday after was executed in Southwark.

Baily *and* Man. *Saturday*, June 14. Ante

(43) Leases.

Wild for the Plaintiff in Ejectment on demise, first of May, 23 Car. 2. by Bucke special verdict find the Vicaridge of Cradbrook, with cure, that Fletcher 30 Oct. 3 Eliz. was Vicar, and 13 Oct. least 3 Messuages to Pottriff for 89 years to be enjoyed without hinderance of the Vicar and his Successors; that the Patronage belonged to the Archbishop, who with Dean and Chapter confirmed; And before the end of the term these were built into seven Messuages, now declared on in Cranbrook a Market Town, none being the Mansion house of the Vicar, they find the Statute 13 Eliz. cap. 10 & cap. 20. of non residens, & 14 Eliz. cap. 11. and that 3 Car. 1. cap. these are continued, but he doubted that this doth not continue the last Statute of 14 Eliz. 11. they find 25 Oct. 14 Car. 2 Cooper was instituted Vicar, and 26. November 14 Car. 2. least

to Goldsmith for three years, which was not confirmed: that Sept. the 11. 15. Car. 2. he devised to Ralph, from Mich. after for 21 years, which was confirmed: and that Cooper was resident and dyed. 20 Jan. 15 Car. 2. Then Bucke was instituted, and leased to the Plaintiff; and he only took notice of two exceptions to the Lease of Cooper. 1. That on 13 Eliz. cap. 20. death is no non residens, nor the Lease void thereby, and 13 Eliz. Cap. 10. is repealed by 14 Car. 2. Cap. and left at Common Law, with the qualifications in 14 Eliz. Cap. 11. the end of the Statute of Non residens, was to enforce 21 H. 8. Cap. 13. that only inflicted 10 l. penalty thereon, but this voids all the Leases, and gives a years value of his Land, whereby they were forced to Covenants of Residens; also death is no crime, and the penalty is only on persons offending; also the Leases for three lives were intended according to the power of the Common Law, without the confirmation of Patron and Ordinary, which determined by his death, and the confirmation were needless if it should so determine. 3 Cr. 270. and Moor 270. pl. Mot & Hales is a single Case, and hath no reason to maintain it, so the Lease is good notwithstanding that, but secondly, this is void on 14 Eliz. Cap. 11. being a Lease in reversion, there being no Lease more properly; so then, a Lease to begin in futuro, as this is from Mich. next, so on Wast, Fitzh. 18. Lord Cook observes the grant of reversion obstructs action; but on Lease to begin after the life, which is a Lease in reversion, he may have wast; also this is a Lease in reversion as it is concurrent with the other. 11 Jac. 2 Cr. 318. this is in effect but a power, and so ought to be executed in possession, so Cr. 5. & Hub. 269. Clave and Taylors Case. The Statute 18 Eliz. Cap. doth not at all extend to this Statute of 14 Eliz. Cap. and 2. Leonard of Thomson and Traford, Poph. 9. was no Judgment but an opinion denied. Pasch. 14. Car. 2. in C. B. Lin and Win on demise of Abbot in Surry, the Lessee assigned for all but 10 days, then Assignee surrendred, and the Abbey made new Lease to begin at the end of the former, which was held void, there being ten days in being, and 3 Cr. 564. Hunt and Singletons Case is express, that second concurrent Lease is not warranted by 14 Eliz. Cap. Raynsford Justice for the Plaintiff Lessee of Buck the Successor agreed death no non Residens on 6 Co. Butler and Goodales Case, being not voluntary, so were it by the Ordinaries prohibition, or by advice of Physicians for health; also hereby the penalty would be unjustly inflicted on the successor, or the poor deprived of the years value. Secondly, the reservation quarterly, or within twenty

twenty days doth not avoid the Lease, albeit the term will end before the last Quarter be due; albeit on Lease for life, as Co. Cluns Case, the Rent goeth to the Heir, yet on Lease for years, the twenty days at the end of the term is void, as 2 Cr. 233. Cited in Berwick and Folters Case; but Thirdly, this is a Lease in reversion, being made before the expiration of a former Lease, by Cooper for three years, and also is made the 11th of September to begin from Mich. next, and whither it be to begin when another Lease ends, or to begin in futuro, both make it a Lease in reversion, and so is every Estate that is opposite to the possession. Twisden Justice ad idem, that death is no non residens, Parsons Lease for a thousand years, was a good Lease against himself, and if confirmed by Patron and Ordinary had bound the successor at Common Law, and the Statute of 13 Eliz. Cap. 20. intended only to prevent oblique conversion of the profits to their private use, which cannot be thus by death, the punishment by a years profits was intended to make men resident, which cannot be effectual after death, and Bonds and Covenants as on Bail, are discharged by death of principal, and 6 Co. Butler and Goodales Case. Imprisonment excuseth non residens, yet is the parties own default; also this would repeal 13 Eliz. Cap. 10. that gives power to Lease by the same breath that it was made; the Case of Mot and Hales is lame, and Cook that was of Council in it cannot be imagined to escape this, if it were adjudged on that point. Secondly, This Lease is void on 14 Eliz. Cap. being a Lease in reversion, and this Statute being a repeal of 13 Eliz. Cap. 10. and to increase Trade and Inhabitants; he grounded this on Pl. Com. Throgmorton and Tracy, that its a Lease in a second degree, and therefore is in reversion; also the words do not prohibite a Lease of the reversion, but in reversion, which is more comprehensive, and this is no Lease in possession, and therefore it must be a Lease in reversion: and 32 H. 8. cap. 28 & 18 Eliz. cap. Nor no other Statutes do not favour double Leases: and Hub. Crane and Taylors Case calls this a Lease in Reversion; and the Statute prohibits any Lease in Reversion, whether it be above or under 40 years. So Poph. 9. is not Law: Also this Lease is not aided by 18 Eliz. cap. though the Statue did extend to 14 Eliz. cap. as it doth not do no more than to 1 Eliz. of Leases concurrent by Bishops. Hales Chief Justice, 1. supposing this a Lease warranted by 13 Eliz. cap. 10. though it were made before, without doubt its not void by death as a non residence, no Lease being thereby voidable, but what subjects the Encumbent to a punishment. The Case

of Mot and Hales, was by three Judges adjudged that it did avoid the Lease, but was a hard opinion, and encountred by Hill. 38 Eliz. Rot. 781. Moor pl. 609. and this would shake many Leases now in place; this is plain, though the question of this Case sprang thereon. 2. The Lease is good, notwithstanding the reservation, Quarterly or within 20 days, here being no disadvantage, but an advantage to the successor, who hereby will have the Rent due at Michaelmas, if he be inducted within 20 days on the death of the predecessor within the 20 days. 3. Supposing two years of a former Lease; a new Lease to begin presently is no Lease in Reversion, nor any Lease void by 14 Eliz. cap. 11 for by 32 H. 8. cap. 28. the enabling Statute extends not to Leases in Ferm, but where only one year is in being; nor to other Leases than for three Lives or 21 year a die datus. 1 Eliz. cap. 19. is the like, which 13 Eliz. cap. 10. which gives power to Lease for three lives or 21 years, from the making 14 Eliz. cap. 11. provides that 13 Eliz. shall not extend to houses in market Towns, provided no Lease be made in Reversion 18 Eliz. cap. 6. recites 13 Eliz. 10. but not 14 Eliz. cap. 11. and saith that all bonds contrary to 13 Eliz. or 18 Eliz. shall be void, not that such bonds contrary to any former Laws shall be so, and this is a Lease in possession, though if more than three years had been in possession, the Lease had been void: and 14 Eliz. cap. repeals 13 Eliz. sub modo exempting Leases in Corporations: therefore 18 Eliz. doth extend to 14 Eliz. and these Statutes are so linked together, that all are used together to expound one another: as in 1 Eliz. and 13 Eliz. there are no words that the Leases should be by Indenture, or that the ancient Rent should be reserved: yet 14 Eliz. cap. must have all these ingredients: also if 18 Eliz. cap. should not extend to 14 Eliz. if there were but an old Lease for a day in being, it would avoid the Lease: also in Hunt and Singletons Case, there were ten years in being. And in Line and Wins Case, there were some years in being, six or seven when the later Leases were made, and so there was no surrender, but only an assigment, so its not void, because there is another Lease in being: 14 Eliz. being Mortized into 13 Eliz. is no repeal of it, but a qualification to the advantage whereof 18 Eliz. cap. may well extend: also Hub. Crane and Taylor is upon another distinct clause in 14 Eliz. that refers particularly to 13 Eliz. as to Bonds and Covenants for Leases, which is Law: and yet comes not to the conclusion of this Case: But secondly this Lease as its here found to begin in futuro, whether there were a Lease in being or not, is void

and

and warranted by no Statute, being a Lease in Reversion; the only pretence against which is the not exceeding 40 years; for if it were for 40 years in futuro it were plainly void, and an Act of Parliament enabling to Lease for 40 years in possession doth not warrant a Lease from a day to come, though for lesser time than 40 years: for thus he might make a Lease for 30 years to begin 10 years hence, which would disable the successor, and abate the advantage of the Rent: and Dyer 246. pl. 69. a Lease by Tenant in tail to begin in futuro is void: Moor 733. pl. 1018. a power to make Leases from the making for 99 years warrants not a Lease for less time a die datus, and there can be no other Lease in reversion, but what is made a die datus: and 32 H. 8. Cap. 28. §. 11. doth shew this Antithesis; also Poph. 9. hath been often denied; also on power to make Leases in possession, warrants not a Lease in futuro, as King and Hamson; also on power to Lease in possession or reversion, a Lease a die datus, or in futuro is good; but in the Case at Bar, if the Lease had been found seald and delivered after the day, it had been good enough; & per Curiam Judgment for the Plaintiff.

Dominus Rex and King.

(44) Constable.

IN Information for refusing the Office of Constable being duly chosen in the Hundred of Nortonferris; the Defendant pleads that he is a resiant within Quincauton an ancient Borough, wherein is a Leet, time out of mind, to which he oweth suit and service, and so prays an Judgment if he shall be compelled to serve in the Hundred; to which the Plaintiff for the King demurs. And the Court conceived that by service to the Leet, Men are exempted from service to the Hundred, unless by prescription the Hundred claim it: but this is not sufficient to excuse a Constable chosen in the Hundred with a ratione cujus. But if there were a Special Custom to be discharged, it might be good. Sed Adjornatur.

Curteis *and* Bourn.

(45) Waste.

JOnes on Registre Jud. 23. & Digest. 202, and 204. conceived this Writ good, or especially aided by Verdict, the saying the waste was to the disherison is after Verdict; but from, and as on Ipsi non sint culpabiles is well enough for one; but the damages being given also to both, its incurable per Curiam; and Judgment reversed, Nisi.

Bould

Bould *and* Price.

(46) Assets. IN fieri facias with a scire facias, and assets, the Sheriff returned wast, and the Defendant pleaded plene administravit, to which the Plaintiff demurred, especially because the point of the Inquisition is not traversed, and per curiam, Judgment for the Plaintiff. Nisi.

Fletcher *and* White.

(47) Condition. IN Debt on obligatory Condition to save harmless of escapes, to which the Defendant pleaded that he had saved harmless not said coment, to which the Plaintiff demurred generally. Sed per Curiam, albeit this be ill on a special demurrer, yet its aided by general demurrer 2. It was to pay to John Woodal, and the Defendant pleads payment to Plaintiff; which per Curiam is ill, and Judgment for the Plaintiff. Nisi.

Welch *and* Bell. Ante.

(48) Infant. THe Et hoc paratus est verificare, &c. is all one with prout Curia consideraverit, which is only to direct the manner of tryal, and the Plaintiff may reply: Also the Demurrer should be special, this being but form, also in Eschequer lately it was ruled that in nullo est erratum, is no Plea to Infancy, assigned for Error, being against the Record; and the Court would have reverst the Judgment, but that it was agreed to try the Original merits: and Hale Chief Justice said on in nullo est erratum the assignment that the party was not Sheriff, was held ill: So & hoc paratus after a full Issue, by the Negative and Affirmative, especially if there be a Special murrer

Bowden *and* Hutchins.

(49) Rent. IN Replevin the Defendant avowed for Rent on reversion devised by I. S. who was said to be seised in fee, and afterwards died; not said Inde seisitus; to which the Plaintiff demurred generally, sed non allocatur; for though this be the better pleading, and ill on Special demurrer, yet its aided on general demurrer, for being seised in Fee it shall be intended

intended to continue; and if by any means it can be intended but form, it shall be so upon a general demurrer; as whenever its good after Verdict, as Dyer want of averment of lives; yet Wild Justice said in C. B. in Walkers case want of Attornment was supplied by a virtute cujus he was seised; yet its ill on general demurrer, and Judgment for the Avowant.

Carter *and* Chilcock. Hill. 24. *and* 25 *Car.* II. Rot. 852.

ERror of Judgment in Assumpsit on two several promises one found for the Plaintiff, the other for the Defendant; and Judgment was for the Plaintiff for one, and for the Defendant as to the other, that he be in misericordia, not said & eat inde sine die, which was held ill: but Hales Chief Justice said he should have Judgment as to the one, and Reversed as to the other; and so Hales Chief Justice said he had known it adjudged on two several Covenants, and several breaches and damages. Also in Dower one Judgment of Land and damages may be reversed as to the one, and affirmed as to the other; it being anciently used thus only to reverse so far as there is defect in Edward the thirds time: but Curia contra, that it must be wholly reverst or affirmed against Hub. in Jacksons Case in Action upon the Case for words, 1 Roll. Et adjornatur. (50) Joynder.

Heath *and* Hall.

IN Scire facias against Bail he pleads a fieri facias, and part levied thereby the 14 of November, and that a Capias issued the twelfth of November, and payment for the residue; to which the Plaintiff replies as to the sc. fa. Nul tiel Record and so the Mony was said to be paid; to which the Plaintiff demurs, because the Capias is before the fieri facias, though both be Returned the same day; sed non allocatur: for albeit this were a trick to take the Goods by fieri facias, whereby the Bail had no opportunity to bring in the Body, and a nil capiat as to the fieri facias, and Mony paid thereby, and Judgment for the Plaintiff for the residue. (51) Bail.

Davies

Davies *and* Lyning.

(52) Trades. IN Trespass the Defendant Justifies the taking three dozen of Woollen Stockings, averring them Haberdashers Wares, and that they were sold in the Town of Taunton, which is a Market-Town, on a Fair-day, on the first and second of Phillip and Mary Cap. 7. To which the Plaintiff replies, That he is an Inhabitant and Free-man of the Market-Town of Bridgwater; to which the Defendant demurred: but per Curiam an Inhabitant in either may sell in either, and the Statute was made only to prevent such as live in the Country, not such as live in Market-Towns, else it would make a great Monopoly, as 3 H. 7. Cap. was made against the By-Laws in the City of London, That no Free-man should go into the Country to sell, would be hereby repealed, and Judgment for the Plaintiff.

Bennet *and* Bennet. Hill. 24. *and* 25 *Car.* II. Rot. 250.

(53) Notice. DEbt on Articles to surrender the Copyhold, or pay 200 l. on refusal to come to the Court; the Action is laid in London, and affirms notice there of a Court in Puddimore, yet refused; the Defendant pleads that Puddimore was 200 Mile off, and that he had not sufficient notice, the surrender being the same day; to which the Plaintiff replies, That he had sufficient notice; to which the Defendant demurs: and the Court conceived the notice insufficient, and the replication is a departure, being tied up to a day, the day and place is not generally material on not guilty, but here the plea is tied up to a time. So in Trespass if the Release be pleaded to the second of May, the Plaintiff must answer to it in Trespass the first of May, albeit generally the day be not material in Trespass in evidence, but in pleading it is; and the Court gave leave to discontinue.

Thornton *and* Pickering.

(54) Slander. IN Prohibition on suit in Spiritual Court for saying the Defendant was the Father of a Bastard Child; to which the Plaintiff pleads that what he said was in Sessions; to which

which the Defendant pro conſultatione pleaded it was ſaid out of Seſſions; to which the Plaintiff replies, There is an order of Seſſions, that the Defendant was the reputed Father, and that the Defendant is Eſtopt to ſay that he ſaid it out; to which the Defendant demurred, & per Curiam the order of Seſſions being final herein, the Spiritual Court cannot take Conuſance of them: and on 2 Cro. a Conſultation was denied, and the Prohibition ſtood.

Roberts *and* Tuttil.

(55) Bargain and Sale.

ERror of Judgment in C. B. in Replevin, where the Defendant avowed in Saxingham, by device of Juſtice Gawdy of Rent and Aſſignment by bargain and ſale to Boccas and Robert Gawdy, and from them to Sucklin, who by fine conveyed to the avowant, and others, who ſurvive. After verdict and Judgment for the Avowant, it was aſſigned that this is bargain and ſale of reverſion in conſideration of Articles, not averring any mony was paid, which per Curiam, is Error, notwithſtanding the Caſe of Wats and Dixy, Stiles 188. pl. 43. But had the Articles been for mony, the conſideration of the Articles, if recited, had been ſufficient, but here they may be voluntary, and on Lambeths Caſe. Judgment reverſed. Secondly, The Avowry was for part of Rent, not ſaying what was become of the reſt, which by Hale Chief Juſtice is well enough; for till Replevin brought, there may be ſeveral diſtreſſes for ſeveral parcels, and its not like Debt, which muſt be for all, which the Court agreed, but the new Statute aids this, 16 Car. 2. Cap. 8. and Judgment reverſed, Niſi.

Twiſleton *and* Dunkim, *in* C. B.
Monday, June 16.

(56) Sheriff.

THe Court conceived the Condition to appear in Chancery at Weſtminſter, ubicunque, &c. doth make the Bond void, and cannot be intended ubicunque the Chancery is in Weſtminſter, but as the Writ requires in Chancery, ubicunque fuerit, which is not ſatisfied with the former, and Twiſleton and Hopkins being the ſame; Judgment for the Defendant: but the other is well enough.

Cloak *and* Hooper. Ante.

(57) Covenant. IN Covenant on Indenture the Eighth of October, 1652. of demise to hold for 99 years after the death of Zenobia King, if the three lives so long live; the Defendant pleads, that the Plaintiff potuit uti & enjoy the Premises without the let of the lessor; to which the Plaintiff replies, that the Lands are and were Dutchy-Lands, and that the King for Fine and Rent had devised the reversion to Hoskins for 99 years, if the three lives live, by reason whereof he could not enjoy; to which the Defendant demurs; & per Curiam Judgment for the Plaintiff: All this being confessed by the Defendants demurrer, and the Plaintiff needs not shew that Hoskins entred, but the Defendant should plead it.

Kellard *and* Westcom.

(58) Executors. IN debt as Executor on the Obligation entred by the Testator 10 No. 17 Car. 2. The Defendant pleads that the Testator made Collins and another Infant Executors; that after his death, and before the Action, the Administration was committed to Henry Collins, during the minority of the Executors, and he Administred; to which the Plaintiff replies, that before this Administration the Defendant was before that possessed of divers Goods; to which the Defendant demurred; & per Curiam Judgment for the Plaintiff, because the bar is ill in demanding Judgment of the Writ: for thus he might Administer any Goods before Administration taken out.

Wazy *and* Conquest.

(59) Traverse. THat the traverse of particulers is ill of day, place, enrolment, &c. and should be only of the Bargain and Sale, modo & forma in Trover of Goods.

Twyford

Twyford *and* Buckly. Ante.

IN Covenant to make a Leaſe for three lives, the Defendant pleads that none of the lives were named by the Plaintiff; to which the Plaintiff demurred; & per Curiam Judgment for the Defendant: and that the Plaintiff muſt name them. (60) Leaſes.

Haughton *and* Wilſon. *Modern Rep.* 167. *pl.* 5.

SErjeant Jones prayed a Prohibition in ſuit by the Executors of a Proctor in the Spiritual Court for Fées, this reteiner being a Temporal contract, and not concerning matters Spiritual or Matrimonial; and if the Cauſe it ſelf be not Spiritual, though the perſon be, it matters not, 2 Inſt. 448. and in C. B. in a Quantum meruit for Fées a Prohibition was granted: and 2 Inſt. 491. here is no mixture of Spiritualty in the matter, and F. N. B. 41. B. and 12 H. 7. 23. do not make againſt this; alſo the Common Law takes notice of their Extortion, therefore muſt take notice of their Fées. Serjeant Goodfellow oppoſed the Prohibition, becauſe the Executor hath the ſame remedy as the Proctor had; alſo theſe Fées appear to be for matters there depending, and there is no preſident of ſuch Prohibitions, and they are the proper Judges of their Fees there, and the Common Law takes no notice but for neceſſity to puniſh Extortion: and in Dale and Dods Caſe the Court were of opinion no Prohibition would lie for bare Fées. The Court agreed that for coſts tart there, the ſuit may be there, and no Prohibition: and by (Vaughan Chief Juſtice) Fées are of the ſame nature as Expences of ſuit there, for which the ſuit is proper there, upon the general reteyner by Law; for the Court may compel any to be a Proctor, as the Court here may compel any to be an Attorny or Counſel: but upon a Special reteyner and agreement of parties there is a remedy at Common Law, and there a Prohibition ſhall be granted, but here debt lieth not for Fées there: and Sir Edward Lakes Caſe, a Prohibition was not granted, becauſe the ſuit was for Fées in Lincoln; but becauſe the ſuit was before himſelf for his own Fées: alſo this is no perſonal priviledge, but is grounded on the reteyner, which in their Law, may be different from ours; and they are proper Judges what is a ſufficient reteyner and what not, which (61) Fees.

Windham agreed. Atkins and Ellis contra, that there is no difference between Contract Expreſs, and Implyed; and Regiſter 52. is only for coſts aſſeſſed by the Court, which is proper there; but here the contract is Temporal, and Action upon the Caſe lieth for Fées, therefore a Prohibition ought to be granted the rather becauſe the matter of the ſuit doth not appear to be Spiritual, and Dr. and St. 50. if the Temporal Court have no conuſance if the matter be Temporal, 7 Co. Kens Caſe, this Court will prohibit; alſo what the Fées there are is evident; and ſome of the Judges (in Dales Caſe made no ſcruple but Prohibition lieth without denial of the cuſtom; alſo the ſuit is for Fées for 10 years, which at Common Law is within the Statute of limitations, not ſo in Spiritaul Court; alſo for Fées in Chancery to the Solicitor, the ſuit is here; ſo at Council-Table, and the Court being divided, no Prohibition, but to declare and ſtay in the mean time by rule.

D E

DE
Termino Michaelis

25 *Car.* II. in *B. R.* Anno 1673.

Thurſday, October 30.

Hale Ch. J. & *Rainsford*
Twiſden & *Wild.*

Warren *and* Orpwood.

SIR Francis Winnington prayed abatement of Writ of Enquiry on 16 & 17 Car. 2. Cap. 8. by Affidavit of Ceſtui que Vy's death after the Judgment two days, and by the Act the damages are to be from the Judgment affirmed in Error, which was a Term after; which the Court granted, but ſaid it were better the mean profits were recoverable in Ejectment by the ſame Verdict, &c. Wild held this ſhould be given in evidence on the Writ of Enquiry, but being no bar, but in mitigation, that is not ſufficient, and it was ſtaid. (1) Br. Error. 117.

Jacobſon *and* Charlton & *Uxor.*

IN debt againſt Baron and Feme, the Executrix on Obligation of Maneſtry to the former Husband, and Verdict on Devaſtavit, after ſcire facias and fieri facias, and Error and Judgment affirmed; the Feme alone was taken in Execution, and now here by rule, and Levins prayed ſhe might be diſcharged, ſed non allocatur, here being a Verdict of the waſte, and it appears not but it might be in Widowhood dum ſola; but (2) Bar. and Feme.

but by Hales Chief Justice had the wasting, Stratton and Jane Midgly and Dixon appeared to be during coverture by her, yet she alone might also be taken in Execution, on 1 Cr. 519. but this not appearing she was remanded: Symson for the Plaintiff.

Chambers *and* Pattinson.

(3) Administrators.

IN Trover by the Administrators for conversion mean between the death of the Intestate, and the Administration committed. Thomson excepted in arrest of Judgment, that this conversion was before the Administrators Title, sed non allocatur; for the Administration shall relate to the death of the Intestate, and Judgment for the Plaintiff.

Dominus Rex and Pratt.

(4) Prohibition.

SYmson prayed a Prohibition on Articles Ex Officio, in the Printed Book the Oath being to present all offences contra to the Ecclesiastical Laws; which the Court would have granted, but said that by agreement in the Eschequer with Civilians, it was stated that the Oath should be only to present such things as they ought by the Laws of the Land to present; & per Curiam on Article that the Church-wardens shall make true presentment, they will grant a Prohibition, or when any Article is too strait; but in this case the party was referred back to Sir Robert Wiseman to regulate the Oath. Sed adjornatur.

Syms *and* Syms. Trin. 25 *Car.* II. Rot. 672.

(5) Administrators.

DEbt for Rent on a lease to B. for a year, who pleaded an Eviction by Michel and his Servant Administrators of the Lessee who dies intestate, May 69. the Plaintiff replies that before Michels, that by the Bishop of Bath Administration is granted to D. and the Administrator assigns to J. S. who assigned to J. N. who surrenders to the Plaintiff that had the reversion, then the Plaintiff least to the Defendant, and that the administrator is cited into the Bishops Court, and there the administration confirmed, to which the Defendant rejoyns that on an Appeal from that sentence, & de administratione to the Arches, that is repealed, and new administration granted to Michel and his Servant whom by the Defendant is evicted, and had this been repealed by the Bishop it had been, 6 Co. 18.

18. b. Packmans Case, but being a repeal by the Arches it is stronger; but by Hales Chief Justice no bona notabilia do here appear, nor no appeal from the first Administration but from the sentence of confirmation, so all done by the first Administrator is good and executed, which the Court agreed, and Judgment for the Plaintiff, Nisi. And though the Appeal were from the first administration, yet if not in convenient time it will not avoid the surrender, or other mean acts.

Dinsdale *against* Isles, Mich. 24 *Car.* II. Rot, 609. Ante.

(6) Trespass.

IN Trespas the Defendant justifies for distress by lease at Will to the Plaintiff, the Plaintiff replies that in August the Defendant devised to the Plaintiff for years to begin presently, and that by vertue thereof he entred: The Defendant rejoins that there was an agreement to continue possession by tenant at Will till, Michaelmas next absque hoc that the Plaintiff entred before. Holt for the Plaintiff held the contract for lease for years to begin presently, though it were agreed the lessee should not enter till Michaelmas is a present determination of the lease at Will, and on Co. Lit. 55. b. the agreement cannot support it, and the Plaintiff hath traverst the agreement, and the travers of the Entry by Defendant is immaterial on Hub. Digby & Fitzherbert; and by Hales Chief Justice where the matter is not traversable without an Inducement the Inducement it self is traversable, as in Trespas justification by special warrant absque hoc, that he is guilty before or after the day of the warrant, is traversable; and here the only question is whither the Entry be traversable which is a mischievous Case on common Recoverys and marriage Settlements who make Leases and Releases, where there are such tenants at Will in possession, and Utlary is no determination of Will till seisure, notwithstanding 5 Co. 116. b. Olands Case, so upon an extent, but here is a lease confest and the agreement is collateral, but on a lease from 25 March last for 25 years, from hence forth this begins in point of computation from 25 March, but in interest from the present time; and on a parol lease from our Lady day with agreement not enter till Michaelmas must be construed as a lease in Interest only till Michelmas, as where the land is sold where Corn is on the ground, with agreement not to enter till after; this is but in point of Interest from the time of Entry; but here the Lease doth not appear to be by parol, nor doth it appear to be made after Michaelmas from the day precedent as in truth it was; therefore that doth determine the Will

Will, because the lessée takes notice of it; but it is not so in a settlement by lease for years and release if the tenant at Will knows nothing of it; thus to say I do determine my Will is no determination of the Will, unless the lessée at Will have notice of it and will take advantage of it; and Judgment for the Plaintiff per totam Curiam.

Homesby *and* Ashton.

(7) Assumpsit. IN Assumpsit by the Plaintiff, as Administrator of his Wife on agreement that the Defendant might have the goods of the Intestate, the Defendant should pay to the Plaintiff 100. l. within a year after marriage: After verdict, Brewer excepted in arrest of Judgment that here are no parties Interest concerned, as Hume & Hinton of forbearance of one not Executor or Administrator lyeth not, Yelverton 124. Sanford & Cutler, & Yelverton 124. Smith & Jones & 3 Cro. 565. but per Curiam the communication being betwix the Widdow, who had precedence, and the Son and the Daughter in equal degrée, the Defendant hath benefit by it, therefore the consideration is good as to pay the just debt without suit; and though the discourse were not to withdraw a Caveat, or that the Defendant should have administred, yet the Widdow and Daughter being entitled by Law, though no administration were granted, for upon this agreement the Ordinary would grant administration to the Son, and hereby the difference was reconciled; and if the Mother or Daughter had taken administration, the Son had remedy by the agreement; and Judgment for the Plaintiff Nisi: And the very permission of possession of goods to the Defendant is sufficient for Assumpsit.

Forcet *and* Franklin. *Trin.* 25 Car. II. *Monday*, October 27. Rot. 313.

(8) Tythes. IN debt of 2 Ed. 6. cap. of Tythes to the value of 40. l. it was agreed by Mr. Attorny Finch, and Sir William Jones, &c. for the Plaintiff, and Serjant Mainard, the Solicitor, &c. for the Defendant, that the Lands were the Priors Hospitlers, And discharged of Tythes at the time of 32 H. 8. cap. 31. but whether or not on Weston and Whitty, Bridgman 32 in Disms, Br. 12. §. 43. this be discharged in the hands of the Patente on 31 H. 8. cap. 13. §. 21. was agreed to be found specially, the Defendant relying on that Judgment the Plaintiff

Plaintiff upon the former resolutions; but because it did not appear whether the Hospitlers were discharged only by Bull, Quamdiu in manibus propriis, as the Plaintiff agreed, or by prescription as the Defendant affirmed; and which is well enough consistent with that Bull, which doth not take away any prescription that was at Common Law before, Adjornatur.

Esto *and* Brown.

IN Trover, Shouldham on Verdit of 2 Instrumenta ferrea Anglice Ploughshares and Coulters, excepted in arrest of Judgment; that this is uncertain, which Rainsford and Wild, the rest absent, agreed, and staied Quousque. (9) Trover.

Long *and* Harrison. *Tuseday*, October 28.

IN debt for a years Rent ending at Mich. 1671. 3 Cr. 606. pl. 5. on Lease made from Mich. 1670. for a year, and so from year to year for four years, if the custom would permit, without forfeiture part being Copy-hold, paying the Rent at Midsummer next, and at Christmas; which by Holt in arrest of Judgment cannot be, 3 Cr. 515. but per Curiam, the reservation being of the Rent of 17. l. yearly the saying after paiable 8. l. 10. s. at Midsummer, and 8. l. 10. s. at Christmas: The first three years is not repugnant, Com. 171. b. 2 Cr. 228. and the demise pro uno anno refers to the Rent, not to the Term; though the Rent be not due at Michaelmas, nor for a year at Midsummer, yet being ad huc aretro at Michaelmas, though two half years fall within one half year as they may to enable the Lessor to distrain for the last half years Rent, and the action being not till after Michaelmas, its well enough and Judgment for the Plaintiff, per Curiam. (10) Rents.

Benet *and* Thorn. *Hill*, 24 Car. II. *Rot.* 469.

IN Trespass the Defendant justifies as Baily of inferiour Court of Record, by process there on plaint by J. S. against Price; for whom the Plaintiff Benet was Baile there, and that Judgment was given there, and that there is a custom; that if Bail do not render the body, that then the Plaintiff may take a Firi Facias against the goods of the Defendant and Bail together, which was done directed to the Defendant, who by vertue thereof justifies the taking the (11) Bail.

goods; to which the Plaintiff demurs, and shews for cause specially that this custom to take principal and Bail together, without Capias or Sc. Fa. against the principal, is void, 220. pl. 31. adjornatur.

Hind *and* Lloyd. *Hill.* 24. & 25 Car. II. *Rot.* 165.

(12) Assumpsit. ERror of Judgment in C. B. in Assumpsit to pay to the Plaintiff or such person as he shall appoint to his use; and its said he did not pay to the Plaintiff, not saying, nor to any one appointed by him, Licet the Plaintiff assigned Noyes to receive, &c. but sheweth no notice given to the Defendant after verdict; and Judgment on non Assumpsit. The Court conceived had no appointment been, it must be paid to the Plaintiff: and by Hales Chief Justice here is an insufficient appointment, being without notice; but the Issue being not upon the non-payment to the party appointed, that is waved by the the non Assumpsit: So Limerick and Langham on a disjunctive clause, where breach was assigned on one part and not on the other, when issue is taken on that, after Verdict, the party shall not resort to shew non-performance of the other, and Judgment affirm, nisi out of C. B.

Ryder *and* Ablet. *Hill.* 24. & 25 Car. 2. *Rot.* 1258.

(13) Covenant. IN Covenant to assign a Colledge Lease, and to give sufficient security for enjoyment thereof by such a day, which was before any day of paiment to be made to the Plaintiff; breach is assigned in not giving sufficient security; to which the Defendant demurreed, & per Curiam, had the Covenant been clearly to secure to a day precedent, it would not defeat the first Covenant to assign Ipso solvente; which is a condition precedent, but being expressed to secure before the first day of payment, the security must be first tendered; and the Plaintiff is to do no act but to receive what is tendred, and the Court to judge of the sufficiency: and Judgment for the Plaintiff.

Parker

Parker againſt *Wedneſday*, Octob. 29.

LEvins prayed a Prohibition to Delegates on ſettlement by the Plaintiff on Marriage, with his Wife, to the uſe of his Wife; and whom ſhe appoints without negative words, that he ſhould not intermeddle, and on Will by her proved, and ſentence thereon below; from which the Plaintiff appealed, becauſe Feme cannot make Executor, but only where ſhe is Executrix to prevent dying inteſtate, unleſs the Husband conſent, which he ſayeth by ſuggeſtion he did not: But by Hales Chief Juſtice, Feme Covert may as to perſonal Chattles make an Executor by the Husbands conſent; therefore till plea that the Husband did not conſent refuſed no Prohibition, albeit they admit the plea and adjudge Contra; but after ſentence, if that be contrary to our Law, prohibition ſhall go; as where leaſe is held void, that is good, and before the Delegates, one Common lawyer at leaſt muſt agree, elſe no ſentence. (14) Bar. and Fem.

Williams *and* Benſon. *Trin.* 23. Car. 2. *Rot.* 212.

IN Aſſumpſit for meat, &c. & Quantum meruit, the Defendant pleads an accord to diſcharge J. S. and ſaith quod exoneravit, and ſaith not how; to which the Plaintiff demurred, & per Curiam its well enough, as quod exoneravit pleaded in Bar of Aſſets, not ſhewing how, was ruled good before Breach, and after (15) Accord.

Ketle *and* Biles.

IN Aſſumpſit to pay 5 l. on aſſignment of obligation to the Defendant, by letter of Attorny: after Verdict Paulet excepted that the conſideration is not ſufficiently averred by aſſignment of the bond of Codnor to the Plaintiff, for ſaying he had aſſigned it by letter of Attorny is not effectual; for the Defendant was to receive it to his own uſe, therefore it ſhould be by Deed. 2. It was to pay 5 l. when requeſted; which is not aided by non Aſſumpſit on Licet ſæpius: But by Wild in Pecke and Methold; this is aided by non Aſſumpſit. Hales Chief Juſtice contra; want of day and place of requeſt is aided by non Aſſumpſit, but not want of requeſt, but on reading there (16) Aſſumpſit.

was Licet postea requisitus which is well enough, so in Leech and Bromsalls Case: 1 Roll. 353. (B.) Judgment on promise to pay in consideration of promise of Marriage, is no plea in Bar, of promise to pay on request on promise of Marriage, being several; though the promise being on Marriage was a debt, and so the request not material; which the Court agreed were the promises on Marriage, but being in consideration of the promise of Marriage only, there is no present debt. 2. The assignment by letter of Attorny is according to the condition, and is intended to his own use, but if it had been sufficiently to assign generally he must shew how; but a letter of attorny imports a Deed, and Judgment for the Plaintiff. Pool and Tracy.

Brightman *against* Parker. *Pasch.* 25 Car. II. *Rot.* 36.

(17) Custom. ERror of a Judgment in Norwich, in debt on obligation on Cognovit accionem; here by custom a Writ of inquiry was awarded de vero debito, which per Curiam hath been ruled a good custom, and is so in London and Bristow; and it were fit to be enacted by Parliament, to save Chancery suits, that the Plaintiff may take what is justly due, such great debts being often paid in great part, and hereby they would have only what is due. Judgment affirmed. Nisi

Buckly *Administrator of* Nichols *against* Welsh. *Trin.* 25 *Car.* II. *Rot.* 788.

(18) Payment. IN Sc. F. on Judgment the Defendant pleads payment; to which the Plaintiff demurs, & per Curiam, its ill by the party himself, but by the Bail it were good if its brought by administrator, pendente lite, and the contest in the Spiritual Court being on Will nuncupative, its doubtful, if only about administration its well enough; but if the contest were between Executors, or on controversie of a Will in writing; such Administrator pendente lite cannot sue as

hath been adjudged, Adjornatur. But in both he must aver the contest continues.

Carter

Carter *and* Chilcot. Ante.

(19) Error.

ERror of Judgment in Exceſtre in action upon the Caſe on ſeveral promiſes, Verdit on non Aſſumpſit to all but one, and that for the Plaintiff was aſſigned in want of Eat inde ſine die, in the Judgment againſt the Plaintiffs, which per Curiam is not aided below; and the Court cannot affirm as to one of the Judgments, and reverſe as to the other; but all muſt be totally reverſt, though the promiſe be diſtinct as And Judgment reverſt.

Mayor of London *and* Noble. *Paſch.* 25 *Car.* II. *Rot.* 374.

(20) London.

ACtion upon Treſpaſs of breaking Cloſe, the Defendant juſtifies by leaſe of a Wharff to Tanner, who leaſt to Noble the Defendant, under whom the reſt juſtifie bringing Cart and breaking Gates; the Plaintiff replied that the Wharff is ancient; and that an Officer hath had cuſtody of the Goods, and opening and ſhutting the Wharff; and fees 1 d. of unſhod Carts and 2 d. of Carts with Iron ſhod wheels: and that by cuſtom the Cart and Horſes may be diſtrained; and becauſe the Defendant denied to pay the Fee to the perſon that was made Officer ſince the leaſe, he diſtrained, and ſhut up the Gates; to which the Defendant demurred. Et per Curiam, the Mayor cannot ſet up ſuch an Officer againſt their own leaſe, but only of ſtrangers; and Judgment for the Defendant: 6 Ed. 6. where an Abbot grants over the ſcite of his Monaſtry, he cannot againſt his Grantee make a Porter, nor after the leaſe of a Park can the leſſor make a Park-keeper, eſpecially here not appearing to be any Officer in at the time of the leaſe, though the Office were ancient.

Chancy *and* Rutter. *Thurſday*, Octob. 30.

(21) Arreſt.

IN Treſpaſs and falſe impriſonment the Defendant juſtifies by Arreſt on Latitat; to which the Plaintiff replied that the Writ was taken out after the Arreſt; to which the Defendant demurred, & per Curiam, the antedate of the Writ will not ſuffice, if the proceeding be after, as Harriſons Caſe on obligation not to proſecute before Eaſter Term; the Defendant ſaith he did not; the Plaintiff replies that he ſued forth a Writ returnable in Eaſter Term, Teſte in Hill. Term; to which he appeared: To which the Defendant rejoyned

joyned that he sued forth the Writ after the beginning of Easter Term, which he is Estopt to do, the first Writ being his own, and the appearance is to that Writ, therefore, though prosecuted by another in his name is not Avoidable, and for the same reason he is concluded to say he sued it out after Easter Term. But a stranger is not concluded to say the Writ was sued out after, and so here, especially the Latitat being not suable, with any other Teste than of the precedent Term, but Original may be Teste at any time: And Judgment for the Plaintiff, Nisi, on Long and Biltons Case, and Benet and Pilkins Case.

Randall *and* Writtall. Ante.

(22) Rents. REplevin of taking in Brickwell in Saltwood, the Defendant makes Conusance under Turner seised of this, being Gavelkind held in Socage, and that he granted a Rent to Jenk. who died leaving two sons, under the youngest of which the Defendant avows, and the only question was if this Rent charge shall descend as at Common-Law or by custom: Hards Serjant for the Plaintiff, held it shall descend at Common-Law; that to make Inheritance departible it must be Socage & antiquitus Devisa, Glanvil libr. 7. cap. 3. and Bract. 34. cap. & Fleeta libr. 2. cap. 9. for its not departible as Gavelkind, but by the custom if it be Socage, and if it be Knights service it cannot be departible: Lamb. paramb. 535. and the nature of the Land only induceth the departibility, and this Rent being granted but 5 Jac. cannot be departibilis & partita, as a Rent by service may, or a Rent by prescription: 2. Custom is in derogation of Common-Law, and therefore shall be taken strictly, 9 H. 7. 24. and not extend to Collateral things: as Lit. Sect. 78. Co. Lit. 386. of a Warranty, Conditions, and Lit. Sect. 222. & 224. and a Rent charge not Apportionable of common right: also Fine of Lands Pl. Com. & 3 Co. Perkins 48. pl. & 4 Ed. 3. 32. Custom Br. 58. nor custom will not extend to a Rent out of the Land. 11 Ed. 3. Dower Fitzh. 85. & 1 Co. 100. b. The difference is between a Rent ancient and de novo, and 5 Ed. 2 Avowry F. 207. & 5 Ed. 4. 7. between a use which is the Land it self, and a Rent: Also here is necessity to make the Rent descendible, for the Lands are still so: Also a Will is not within the custom on Feoffment to the use thereof. 21 Ed. 4. 24. 3. On 1 Co. 84. & Dower F. 42. a Rent de novo differs from the nature of the land, and 14 H. 8. is a thing severed from it. Also,

4. on

4. on 1 Inſt. 13. the Heir ſhall not be diſherited by conſtruction: So Lit. Sect. 31. the objection made upon 26 H. 8. 4. which cites Avowry 150. that a Rent ſhall enſue the nature of the land, which is true of a Rent for owelty of Partition, which is good by Parol, and diſtrainable, of common right: Lit. Sect. 251. Alſo its uſage only that makes cuſtom. 2. Of a Rent 22 Aſſ. 78. granted out of lands deviſable by cuſtom, no Mordanceſter lieth, which 38 Aſſ. 28. muſt be intended of a Rent time out of mind: alſo the actions and tryal for the Rent, ſhall be as of the land, as of Rent granted out of ancient Demeſn, 9 Aſſ. 9. & 4 Ed. 3. 53. & 3 Ed. 3. 74. this hath no reaſon of a cuſtom. 3. Rent on Feoffment by Coparceners ſhall go in Coparcenary, and not ſurvive: 38 Ed. 3. 26. which on 5 Co. Juſtice Windhams Caſe is on the intereſt of the Feoffors, not grounded on the cuſtom, and it may be agreed what is ſaid, that a Rent may iſſue out of lands deviſable, being part of the profits; but the queſtion is when it is deviſed what operation it ſhall have, as to the deſcent farther. Co. Lit. 111. Sect. 585. In Dyer 5. It appears the Courts are divided, and Lamb. 547. only cites Fitzherberts opinion: 22 Ed. 4. 10. Brian is Obiter; and 14 H. 8. 7. & 8. Pollard agrees, but Brook is againſt him; and 21 H. 6. 11. cited out of 30 Ed. 3. is as ſtrong, that it ſhall not deſcend by the cuſtom, and 7 Ed. 3. in Avowry Stath. 27. Fitzh. 150. Alſo 3 Jac. Noy. 15. Randal and Roberts, Rent out of ſeck-fee, ſhall deſcend at Common-law; but by Hales Chief Juſtice, this was Rent out of Gavelkind, and lands at Common-law. Den for the Defendant, that the deſcent ſhall be to all the Brothers, being of the nature of the land, and parcel of it as Rent ancient demeſn is ancient demeſn, and is deviſable as the land is, being but drawn out of it; and Co. Lit. 132 on Sect. 585. Perkins 22. pl. Co. Lit. 111. and upon the Statute de Donis which is the ſame reaſon the Eſtate intailed deſcends to all the Brothers, though it be an Eſtate created de novo by that Statute; ſo on the Statute of Uſes. 1 Co. Chudlies Caſe, a uſe was nothing, till made tranſferrable, and everſince goeth as the land doth: alſo a ſpecial occupancey, Co. Lit. 111. ſhall deſcend as cuſtom is; ſo 4 Ed. 3. 32. cited 14 H. 8. 5. as adjudged that Rent charge ſhall go according to the nature of the land, Trin. 1671. Stokes and Verriers Caſe, Bill in Chancery by a Coheir to have deed of Rent charge, it was pleaded that the Plaintiff was a Younger Brother, and that the Eldeſt Brother had releaſed, wherein Lord Keeper Bridgman was clear of opinion that it ſhould go by cuſtom. Copies of the deed was ordered to be delivered; but the parties being

being poor the Decree waits the event of this Case: also Lamb. 547. the custom is not tied to the land. And 31 H. 8. cap. 30. the Parliament conceived Rents as well as lands ensued the custom. 1. Anderson 191. Smith & Laws, & Noy 15. was that the land at Common-law shall be preferred before the custom, and yet this custom of Gavelkind is as Common-law, and favoured, and is not like special customs: 7 Ed. 3. 38. Co. Lit. 175. b. & 2 Ed. 4. 18. And the Court takes notice of Gavelkind without pleading the customs Co. Lit. 140. Hales Chief Justice; the customs of Gavelkind differ from the customs of a particular fee; to say on Evidence lands are in Kent, puts the other side to prove they are not departible, but in particular fees the party must plead that the lands within that fee are time out out of mind Gavelkind partibilia & partita; and Gavelkind Knights service that come to the King by Dissolution or Attainder on grant out, continues devisable; and the case is the stronger because the lands are in Kent, if any thing do not so descend it must be shewed. 2. Were it particular fees nil prescribitur nisi possidetur; yet being admitted there is such a custom of the land, the construction of the Law carries it over to the Rents which have been time out of mind; but Ales are new in law as well as in fact, yet when it is made to arise out of land the custom is vertually applied to that, as included as well as a Rent service, which is agreed; and Dower F. 85. is of 40 s. and Stallage of Market, which as to the Rent is agreed, and yet this is too great a Rent to be service in that time, but Stallage being in its natue divided from the land, and of new original, they were forced to shew it was ancient, so of Warren, Fair, Retorn' Brevium, &c. which are Collateral, and arise by the Kings grant, but the Rent ariseth out of land, and a Rent de novo is part of the profits: therefore as to the point of custom is governed by the same laws as the lands are, as 22 Ass. 78. where if the Rent had been devisable, the Mordancester would there have lain: and Mich. 3 Jac. 2. Brant. 43. Randall and Roberts, of Rent de novo, granted by Warcup out of land in Gavelkind, And at Common-law Noy 15. which was especially found on Issue, whether the Rent descended to the Avowants younger Brother was singly on the reason of preferring the Common-law, because else it could go no way, but here its descendable as the land. Rainsford and Wild accordingly, the land being the debtor, and Justice Twisden when here, being of the same opinion. Judgment for the Avowant, per totam Curiam.

Foslet

Fosset *and* Franklin. *Tuesday*, Novemb. 4. Ante.

IN debt on 2 Ed. cap. 13. by Impropriator, of the Priory of Saint Johns of Jerusalem which came to the Crown by 32 H. 8. cap. 24. and so the Plaintiff on 2 Cr. 57. Moor. 1291. in Disms Br. 17. §. 25. & 36. Quaris and Spurlings Case, conceived that it doth not partake of the discharge, by 31 H. 8. cap. 13. by the word priviledges, or any other words which are useless as to Fermors contrary to Whity and Westons Case, on which the Defendant relied; and for evidence of a discharge by prescription proved a non-payment, not only in the hands of the owner of the Inheritance, but in the hands of the Kings Fermors of St. Johns Wood next Marrybone-Parke in Middlesex and their undertenents; it was agreed that the Kings Fermer is discharged, though the discharge were only in propriis manibus, and Sir William Jones said it was so adjudged (23) Tythes.

but the Court remembered it not; but held the Kings fee Fermor is not discharged, nor no more is his lessee coming under the priviledge of the Monastery. Co. Bishop of Winchesters Case; the King as a spiritual person may prescribe for discharge for himself and Fermors, but by general prescription his Fermor is not discharged, much less on a discharge by priviledg of order, &c. And the Court conceived the prescription must be found for the King, his Fermors and Tenents; and that non-paiment by the Under-tenents of the Kings Fermor is sufficient Evidence: so of Cestertians, it not appearing that ever they paid Tithes, and yet in Tenents hands; and this was found specially; contrary in the owners hands.

Kendal *and* Pearm.

BIgland Prayed a prohibition on sugestion that the Plaintiff had pleaded that J. S. was Rector, and the Tithes belonged to him, which Plea was refused: and in Hill (24) Tythes.

1671. between Morris and Justice of Tithes in Legingham: and 3 Cr. 228. Green and Penilden, and Taylor; on the like suggestion a Prohibition was granted, which the Court agreed, but would do nothing without an Oath of refusal, unless Libel had been before them, but ordered to shew cause against it; but this being a Sine-cure Inst. & Induction, is needless.

Matthews *and* Bowtel.

(25) Nasans.

IN action upon the Case for building a Wall in the place called the Twichell, between the Plaintiff and the Defendants House, per quod, the lights to his ancient House were stopt; and for digging the ground, whereby his house was in danger, it was excepted in arrest of Judgment that the lights are not said ancient, which was mistaken. 2. It was said to be Trespass joyned with action upon the Case; sed non allocatur the digging in the Defendants Soil to the danger of the Plaintiffs foundation being without vi & armis, is but as action upon the Case. 3. The prescription was for liberty of the Yard, to repair, to set Leadders, &c. which being not well laid and intire Damages, Adjornatur.

Wither *against* Gibson.

(26) Ejectment.

ON a lease rendring Rent to be void by re-entry without demand, by non paiment, there is in Ejectment a rule for confessing lease entry and Ouster, and whether this be sufficient without proof of actual entry is the question: And after Verdict last Assizes Judgment staid till the opinion of the Court known; and Hales Chief Justice said the confession is sufficient, else in every Case of Disseisin, &c. the entry must be proved; but in Ejectment of assignee of lessee, such confession doth not avoyd the assignment, but those must be proved, but whether it were to be demanded or not, or whether right or title of entry, all is one; and this is as on actual lease on the land, which cannot be without entry.

Warren *and* Orpwood. *Thursday*, Nov. 6. Ante.

(27) Error.

SIR William Jones prayed Judgment on Writ of Enquiry, though Damages be after the death of Cesty que vi, & 2 tam pro missis & Custagiis as for Damags, and it was offered in mitigation: also each sum is distinct, so Habito respectu, that is amendable. Judgment Pasch. 24 Car. 2. affirmed Pasch. 25. and the Cesty que vy dyed in June 3 months after, and though it had been two days after the Judgment, yet this is not now tryable, but by Audita Querela and Judgment for the Plaintiff.

Welch

Welch *and* Buckly, *the Administrators of* Nichols.

IN debt on Obligation against the Administrators, pendente lite on sentence for nuncupative Will for the Defendant; on which an Appeal is depending before the Delegates, at the suit of Parker; the Defendant prayed time to plead, sed non allocatur, though such Administrator as this may sue or be sued. (28) Administrators.

Wildman *and* North. Trin. 25 *Car.* II. Rot. 357.

IN Replevin the Defendant avows as taking his own Cattle; to which the Plaintiff demurred, because being in bar it amounts but to the general Issue, as in Trespass; Sed per Curiam in Replevin constat what are the Cattle in certain, so the plea is good enough. Sed adjornatur. (29) Replevin.

The Bishop of Exeter *and* Star. Ante.

IN debt on obligation of 20 l. on Oyer, the Condition was stare mandatis Ecclesiæ, on Presentment for not receiving the Sacrament, whereon he was Excommunicated, and for Absolution gave this Bond; The Defendant pleads he was sued in the Spiritual Court, and Imprisoned, and thereon gave this Bond; to which the Plaintiff demurred: and by Masters he must give caution, F. N. B. 63. C. Register 66. and the Bishop must take it, or else Action upon the Case lieth, 2 Inst. 623. and this by obligation is sufficient caution, which the Spiritual Court are Judges of: & Juratoria is in lesser offences for not appearing, or in greater when he cannot give other: the Canon 354. is by fide jussoria, which hath been in Cases of Marriage expounded of obligations: so Canon 356. on divorce a mensa & Thoro, or Pignoratitia, which are all sufficient in their kind, Regist. 66. b. & 67. a. And surety in Fleta 438. Bract. is of the same import. 2. This obligation is the parties own act, and tendered by him at his election. 3. This is for the advantage of the Subject, pignoratitia cautio being better for the Ordinary: and in Dr. Budds Case, on refusal of such Bond the Judg on Appeal will absolve without. 4. This being Spiritual is not within 23 H. 6. 10. & 5 Eliz. 23. confirms (30)

firms it, being accustomed before, Hub. 83. & 1 Cr. 62, 63. Fotherbies Case, 9 Jac. 1 Bulst. 122. is contra to F. N. B. 66. Cap. 15. for a person Excommunicated is not Bailable, 3 Inst. 42. & 2 Inst. 615. Also its not said, Fecit contra voluntatem suam, or per minas Episcopi; nor that he tendered any other caution that was refused; Sir William Jones for the Defendant, 1. That no Bond is good to the Bishop, security being a term well known to our Law, though caution be not; but in Regist. 67. its expounded to be only pignoratitia, which is controulable by the successor, but Bond would vest in Executors of Bishops in private capacity; and in another Report of 9 Jac. the Judges opinions were full that they could only take a pledge. 2. This obligation cannot be good, being not to Bishop or Surrogate but to both, and may be in name of any Trustee, as Dr. Masters, &c. but ought to be in the name of the Office only. 3. This Bond is void by Common Law; as of the Warden of the Fleet, colore officii; as Moor pl. 1191. Bond for distribution of one not in custody is held void, they having no authority to take them, Pasch. 1655. in Stiles 456. Davis accordingly. Hales Chief Justice said 9 Jac. was by all the Court, but 8 Car. 1. in C. B. Bond for distribution was held void 16 Car. 1. in B. R. Bonds for distribution were held good, to avoid which Question the Statute 23 Car. 2. Cap. 10. was, that henceforth they might take such Bonds; also this might as well be of any great sum; also its not good in the name of the Bishop and Surrogate, but must be in either; also Bond to observe By-Laws is void; also fidei jussoria cautio is by way of Covenant and undertaking, not by obligation; also Bonds for Administration is in the Archbishops name, and this should be in Ordinaries: Rainsford and Wild contra, that there is less inconvenience in this way than in a pledge, but the Excommunication being pardoned Adjornatur, to know the usage. And the Court advised to take costs and discharge the Bond.

Bennet *and* Thorn. Ante 209. *pl.* 18.

(31) Bail. IN Trespass the Defendant justifies by Process, as Baily of Inferior Court, on plaint by Coleman against Pierce, for whom the Plaintiff was Bail, and by custom on non-payment by the principal Plaintiff, Fieri facias went against the Plaintiff and Pierce, to which the Plaintiff demurred, because the custom is void, and so the Process is void, and not only

only erronious; The Court conceived it was erronious enough; and in Superior Courts were the Fieri facias without any Recognizance of Bail or void, as this was by misnomer, it would be sufficient for the Officer to justifie the Execution; but upon a Foreign Attachment, which was used to be pleaded, though lately is given in evidence, if the custom be not precisly pursued, its void; so here the custom not warranting the issuing of such Process its void; for against one, that is no Bail, and against Bail without custom, is all one, and Process out of the inferior Courts without a plaint is void; and Officers killing thereby is murder in him. Et Adjornatur.

Grimston *and* Wade.

(32) Bail.

The Master of the Rolls having Judgment quod habeat Executionem, in Sc. fa. on recognizance in Pety bag brought debt by Latitat in B. R. To which the Defendant put in Bail, and now prayed to be discharged of the Latitat by common Bail, because there being here Verdict on the Scire facias no Latitat can be sued, which Hale Chief Justice agreed pending the Scire facias, that being an election to sue so; but after Judgment entred debt lieth thereon, or upon the Recognizance alone, but not pending the Scire facias. Also the Court doubted no Capias lay on Recognizance in Chancery, and said this hath been controverted and yet is. Sed adjornatur to account in Chancery.

King *and* Welby.

(33) Chancery.

On 1 Roll. 381. and 4. Inst. Saunders prayed a Prohibition to the Chancery on suit there, to overthrow Judgment at Common Law in debt, having pleaded the Statute 4 H. 4. Cap. 23. Which was over-ruled in Chancery. Adjornatur.

Yates *and* Pope.

(34) Merchants.

In Action upon the Case by owners or freight of a Ship by way of agreement; the Defendant pleaded custom of Merchants, That if the Traiter refuse to take the Merchants Goods to compleat the Tunnage, that the Merchant is not obliged; to which the Defendant demurred, for want of place of Venue; and after Writ of Enquiry Saunders excepted in arrest of Judgment, that Visn is needless, this being no custom

ſtom of any place, but of perſons, which may be tried where Action is, as well as miſnomer. Paulet for the Plaintiff, that the refuſal of Goods ſufficient, is but the general Iſſue: Hales Chief Juſtice, at Common Law the Court takes notice of it, but being a particular cuſtom muſt alledge a place; alſo on Lymry and Langhams Caſe on a Charter-party or agreement by Deed ſa Cuſtom, cannot be alledged to derogate from it but on Paroll aſſent, as for fraight in nature of wages, the Cuſtom makes the Contract, and ſo is evidence on non-Aſſumpſit; which Rainsford agreed, and Judgment for the Plaintiff.

Johnſon *and* Muller. Trin. 25 *Car.* II. Rot. 763

(55) Notice. IN debt on Obligation, on Oyer, the Condition was to pay the ſecond of May at the Defendants Houſe, giving thirty days warning; the Defendant a Banker pleads that the Plaintiff did not give thirty days notice; to which the Plaintiff demurred. Becauſe, 1. No notice is requiſite, but Surpluſage, the day and place of payment being certain without it. 2. If notice be neceſſary the Obligor muſt give it; to which the Court agreed, and being uncertain the expoſition ſhall be for ſupport of the Debt, as on Condition at all times within a month, when required, to make further aſſurance, the Defendant pleaded non requiſivit infra menſem, and adjudged in Stiles 242. pl. 556. that this was to be done within a month after required, and not that he ſhould forfeit by not aſſuring in a month; ſo here either its void as to the notice for the uncertainty, or the Obligor muſt give notice, and Judgment for the Plaintiff, Niſi.

Welch *and* Bell. Ante.

(36) Averment. THe & hoc paratus eſt verificare prout Curia conſideraverit, is no more than the Law implies, as No. Nat. and Seld. upon Forteſcue 24. on the word Teſtes ad cap. 23. and this puts it not to the Court to try the non-age, the ancient Forms being & hoc paratus eſt verificare, &c. ubi, &c. & quando, &c. Which includes prout Curia conſideravit; and the Court inclined ſtrongly to affirm the Judgment, notwithſtanding 1 Bulſtr. 37. and Yelverton 58. Sed Adjornatur. To ſearch Precedents of aſſignment of Errors by

by the Infants appearing by Attorny; which on Recoveries or personal Actions are triable per pais after full age on Fines, &c. by the Court.

Dawson *and* Pudsey. Trin. 25 *Car.* II. Rot. 1054.

(37) Lieu.

IN indebitatus infra on forbearance for Horses sold and delivered, not said ubi, was assigned for Error, on White and Browns Case 1 Cr. 571. Ireland; but the Contract for the Horses being collateral, and the Assumpsit on forbearance, that is well enough, and the Contract for the Horses is but inducement; But had the Action been for not delivery, or for the Mony or Sale of the Horses, it must be said infra according to the later Judgments; but the venire facias being ideo præceptum est quod venire faciat, not said ad eandem Curiam, or in Curia. This per Curiam is Error, and Judgment reversed, Nisi.

Caule *and* Lemarke. Pasch. 25 *Car.* II. Rot. 461.

(38) Bail.

ERror of Scire facias on Recognizance of Bail taken by the Mayor on custom of the Inferior Court of Record on Judgment there; the Defendant pleads there is no such custom; to which the Plaintiff demurred, because the party is Estopt now to aver there is no such custom by the Record; also it need not be said the Judgment was affirmed or reversed. Which the Court agreed being not debt nor Sc. fa. on the Judgment; but being not said to be taken in Court may be out, and so not good but by custom, and then it may per Curiam be denied. Adjornatur.

Thomas *and* Sorrel. Ante.

(39) Wine.

IN the Eschequer Chamber, Rainsford Justice de B. R. for the Defendant, that the offence being pardoned, no Judgment can be for the King in B. R. whence it was adjurned hither, the Kings Perogative in ballance with the ruin of the Trade of Vintners being the Question. 1. License is good as to the matter and manner in its creation, because before and at the time of the Statute 7 Ed. 6. Cap. as is agreed by all, any subject might use a Tavern as well as any other

other Trade; but the Vintners were a Corporation before 7 Ed. 6. governed not only by the Common Law, but by their own by-Laws, as in the Special Verdict between Thomas and Waller its found (Stow 609.) the Vintners were an ancient Corporation before the Patent 19 Eliz. and in Write and Gale, and Norris and Masons Case, on the Patent 19 Eliz. they are said to be an ancient Corporation. 2. The Statute 7 Ed. 6. that restrains the Taverns in London to forty, and Westminster to three, without saving to the Vintners who were thereby ruined, and became as a shadow of a Corporation, without power to sell. 3. Since 7 Ed. 6. the Patent of 19 Eliz. shews that the Company of Vintners, and the Free-men were dispensed with, so Dyer 270. by Quen Mary, and they enjoyed these liberties till 12 Car. 2. Against the Statute 7 Ed. 6. and under the Patent 9 Jac. in question hath been an enjoment sixty years, which by this Statute expounded for the Plaintiff would be overthrown, but the Patent must be considered as things stood then, abstracted from 12 Car. 2. Cap. and then they were only looked on as part of the Prerogative, but not of profit to the Crown till 12 Car. 2. Cap. and ever since this Patent the Customs for Wine have been increased, it cannot be denied, but this Statute doth erect a Corporation of Vintners, which would be but a mockery without a power to sell Wine. Its agreed that the Kings Prerogative in dispensing with things not mala in se, is a necessary constitution of the Government, as the safest hand against emergent inconveniencies: Neither is this like the Case of the Admiralty 4 Inst. 135. and 2 Roll. 169. nor is there any doubt as to the matter, that its not malum, but as to the manner, that its malum quia Prohibitum, Bridgman 113. And the Judgment of this Parliament 15 Car. 2. Cap. 14. where its provided the King shall not grant License in derogation from the grant to the Duke, which had been needless unless he could dispence. 2. There is no authority that he may not dispence with Corporation, 34 and 35 H. 8. Cap. 5. that persons seised of Inheritances may demise, includes Corporation, and therefore they are excepted; also Dean and Abbot, or other Corporation, Pl. Com. 502. F. N. B. 223. F. 1 Co. 25. may have such license, which was the advice in Porters Case; and so it was done 10 Co. 1. in Suttons Hospital; also Corporations have some liberties which others cannot have, 20 H. 7.8. as to make a Justice by electing Mayor; also in 27 H. 8. Cap. this power is saved in resumption of Franchises, and 7 Co. 10. and Commission Br. 5. these determine not by the

the Kings death. 2. The extensiveness of the Licenses as to persons, time and place, is only restrained, so as it do not abrogate the Law, which this Patent doth not, neither can any confine it to any certain number, and if it would, yet it appears not that the Vintners exceed this number; but if they did, a license to as many single persons would have been as inconvenient, and it was the Vintners that lost by 7 Ed. 6. therefore it was necessary they should be restored, and its not in their power to make too many free 8 Co. the City of Londons Case, it must be by Service, Birthright, or Redemption, by allowance of the Mayor and Aldermen, therefore the Vintners can Free none but by Service; also its against their profit to make too many Free, therefore shall not be presumed; also every Free-man may take Apprentices; and being no Negative words in the Patent, the King hath a concurrent power with the Company; and as to the places, this is rather a restraint than an enlargement, because any Free-man of London, as Moor 833. may Trade in any part of England; the Grant in our Case being not civibus but liberis hominibus. 4. As to the time that its to successors, its reasonable to make the remedy adequate to the loss they had by 7 Ed. 6. Also the King notwithstanding 14 Ed. 3. Cap. 7. & 23 H. 6. Cap. 8. & 2 H. 7. 6. b. may dispence in perpetuity, as with the Sheriff of Westmorland in fee 12 Co. 18. the same of the Sheriff of Northumberland: and most Corporations that depend on this power for their continuance for ever would signifie little without these liberties which are their subsistance; its agreed in 7 Co. 10. and Co. Entr. 370. that the King cannot delegate this Prerogative, nor can it be taken away by Act of Parliament, much less by any Judges Opinions; but this is executed as an Inheritance presently by the Kings Grant that makes them a Corporation, the Freedom being but a designation of the person to take, as the Heirs of a fecoffee come in by the first Grant, so do the successors of every Corporation; also the Kings granting Corporations with power to chuse new members, after such choice they are in by the Kings Grant, so on 10 Co. 33. Incorporating such as I. S. named: and this differs from 7 Co. 10. of penal Laws, where the penalty was given to the Patentee Sir Walter Rawleigh, which is not so here, but this is a restitution of an important right, 6 Co. 9 Co. as of a mesnalty its to restore Trade, the Life and Being of Cities, as 11 Co. the Taylors of Ipswich; also this Patent was for the honour of the Crown to rescue the Vintners from the ruin by 7 Ed. 6. Also it was for the profit of the Crown, and the alteration hereof

would put such a stand to Trade that would not be countervailed by these Licenses on 12 Car. 2. This likewise increaseth Shipping, and Mich. 2 Jac. Judgments on demurrers in Trin. 2 Jac. could not be aided by confirmation, having no words of a new Grant, Pl. Com. 349. Dyer 269. and the suddainness thereof shews the clearness of the Opinion of the Court. 2. This dispensation is not determined by the Kings Death, being an authority executed presently in the Company, as an Interest or an Authority coupled with it, which is executory only as to the particular persons made free, for without selling Wine they can be no more a Trade, than a Draper without selling Cloth, or a Brewer without selling Ale; also were this but a bare Authority, it must be executed in the Kings name, which would shake all Corporations; and its plain that this is not revokable, as a grant of Chace, or Warren, or to alien in mortmain, F. N. B. 223. G. which is the same in reason with our Case, restoring Corporations to the liberty of purchace they had before, and do not determin by the Kins death, 2 Rich. 3. 10. and 2 H. 7. 6. the non obstante restored the subject to his ancient freedom of being Sheriff in fee; neither doth this license to Waterford work more out of the Kings Interest than this, and it was per Curiam, adjudged in C. B. 12. Car. 2. Young and Wright, Hill. 1659. that the license did not determin, because the Vintner was in remitter, and had his license as the King, which is in politique capacity, and though Judgment be not entred, its recent and sufficiently known. 3. The proviso of 12 Car. 2. that it should not prejudice the Vintners, saves this power and liberty to sell, and this could not be intended of the forty Taverns that are by 7 Ed. 6. given to the City, but is expest to Vintners by the name of Incorporations; and its plain that they did before the restraint by 7 Ed. 6. lawfully use it: and 15 Car. 2. Cap. 14. shews the Parliament intended to save some priviledges to the Vintners, and they have no other of moment than this, to sell Wine. Turner Baron of the Exchequer for the Defendant, that this Patent 9 Jac. hath dispenced with 7. Ed. 6. 2. This dispensation continues after the Kings death. And 3. Is not taken away by 12 Car. 2. And 4. on nil debet this matter cannot be given in evidence. 5. That this Information is defective, and that the dispensation is good, the Law being alterable as to times and places, but 11 Co. where the Law is unalterable as to times and places it cannot be dispenced with as malum in se: 11 H. 7. 11. viz. Adultry, which as human Law may be abrogate by the power that made it, but abstinere a malo

malo ſemper, & pro ſemper is neceſſary, therefore its not diſpenſable but the reaſon and grounds of Taverns are alterable as to times and places of more or leſs reſort, therefore its diſpenſable for the increaſe of Inhabitants, of which the King is Judg; and want of truth and honeſty, or reaſon takes not away the force of the diſpenſation, 3 Inſt 154. Statute that makes a thing tortious as to the ſubject, cannot be diſpenſed with, the matter being not variable, no diſpenſation can avail. 2. This Tavern is not kept in right of the Corporation, but by the natural perſon; but diſpenſations work by Exemption Negatively, and ſo may inure to the particular members, as Moor Waller and Hanger 21 Ed. 4. 55. Alſo conſtat de perſonis to be exempt as to their nature and number, it being not determined with how many the King may diſpenſe with, nor is this diſpenſation as broad as the Law, which would be an abrogation, and the number of the Corporation when made was certain and known, and its but accidental whether they ſhall increaſe or decreaſe: and by this reaſon ſcarce any diſpenſation would be good; and as a Corporation increaſeth, its preſumable the people and habitations increaſe: The poverty mentioned in the Patent was only a reaſon to diſpenſe with them rather than others, but the merit was the ground of the Patent; alſo the Corporation hath no power to diſpenſe, and the Law againſt Tranſportation was for publick good, yet the diſpenſation to the Merchants of Waterford is held good. 2. This is not determined by the Kings death, differing much from a licenſe which is revocable, which a diſpenſation is not, but is relaxatio Juris, that proceeded from a Legiſlative power and Juriſdiction. 3. The Statute 12 Car. 2. doth not repeal this diſpenſation, 4. This diſpenſation cannot be given in evidence or general Iſſue, therefore the Verdict as to this is void, on 27 H. 8. 21. and in Morris and Maſon, 2 Jac. and Write and Gale, the diſpenſations were pleaded at large: So 2 Roll. 683. Trial pl. 3 and though there be a ſpecial Proviſo in 12 Car. 2. yet this is not abſolute to the Vintners, but only conditional if they had any liberty it ſhould be found. 5. The Information is to pay for ſelling Wine between the ſecond of May and the twentieth of January; and it appears not by the Verdict how many Pints were before the tenth of May, ſo Judgment muſt be for the Defendant.

Cole *and* Delawn. *Monday*, Nov. 10.

(40) Infant. IN debt on Obligation, Sir Francis Winnington prayed stay of Trial in Issue on infra ætatem: Wild Justice, said this must be pleaded, and the party cannot be aided on non est factum, but Feme covert may, which Rainsford agreed.

Hudson *and* Brian. Trin. 25 *Car.* II. Rot. 197.

(41) Joynder. IN quantum meruit & indebitatus for Goods sold; the Defendant demurs to the later, and as to the first pleads that divers Goods supposed in the later promise, were the Goods in the first, and not alia, absque hoc that he assumed aliter as to the first; to which the Plaintiff demurs, and for the Cause sheweth its but general Issue, and Judgment for the Plaintiff.

Wright *and* Wadden. Ante.

(42) Taxes. ON 14 Car. 2. Cap. 11. & 16 Car. 2. Cap. 3. under a Clause whereof the Defendant justifies in Action for Smoak-mony, Sir Francis Winnington prayed treble costs, both being but one Act, and so though no costs be given by the later Act, they ought to be treble thereon, as well as on 14 Car. 2. Cap. 11.

King *and* Rose.

(43) Trespass. IN Trespass pedibus ambuland' for killing of Mastiffs and breaking a Cloase, and prostrating Hedges, continuando: as to all; but pedibus ambuland' not guilty, for that the Plaintiffs Fences were out of repair, and the Defendants Hogs went in, and the Plaintiff set Dogs at them, and he went over to secure his Hogs from the Dogs; to which the Plaintiff demurred: & per Curiam this had been a good justification as to the killing of the Mastiffs, but is ill as to the pedibus ambuland' so the whole bar is naught, it not appearing the Fences were to be repaired by the Plaintiff, or contiguous. 2. It was excepted to the Declaration, that as 2 R. 3. 7. & 20. H. 7. 3. 2 Rol. 545. the breaking a Cloase with a continuando

Continuando is ill, sed non allocatur, for a Close may as well be broke as a House, or the Grass trod. Sed adjornatur.

Leech *and* Beer.

IN Covenant on agreement on separation to pay the Wife 50 l. per An. and for non-payment the separation continuing the action is brought, but on Oyer it was proviso that the Wife should live at such a place as A. and B. appoint to her and breach that she did not live so, the Plaintiff replies there was no place appointed; to which the Defendant demurred, and this being not condition precedent, but in Defeasans there must be appointment. And Judgment for Plaintiff. Nisi. (44) Bar. and Fem.

Prall *against Sir* Robert Wiseman. *Tuseday*, November 11.

Symson prayed a Prohibition on Article to present such crimes as the Plaintiff, the Church Warden knew to be of Ecclesiastical Conusans, and such crimes as were so by the Ecclesiastical Law of this Realm, that came to the Defendants notice and knowledge, the Plaintiff would have sworn to present all crimes, that by the Law of the Realm he is bound to, & per Curiam, many Articles are presentable by the Ecclesiastical Law, that by our Law are Prohibited, and though no prohibition shall be as to the Oath it self, yet as to the form when extravagant it shall; and it was agreed in the Exchequer that the Oath should be only to present the Articles contained in the Book (per Eveſque Bristol) so far as by Law they ought, or according to the Ecclesiastical Laws now in force, and the rule for Prohibition was continued till the Oath be so rectified. (45) Ordinary.

Grimston *and* Wade. *Wednesday*, Nov. 12. Ante.

SIR Will. Jones conceived that notwithstanding Verdict on Sc. fa. on Recognizance in Chancery, they may bring an action of debt on the Recognizance, the extent hereon being but from the time of the Judgment; but on the Sc. fa. from the time of the Recognizance: but by Hales Chief Justice a Sc. fa. is an action, and so it may be pleaded to the Debt to be depending; but the Court conceived no Capias lyeth upon a Recognizance in Chancery, and therefore ordered no such execution (46) Execution.

tion should be granted, till the Court be moved, but if the party be taken on such a Capias, its sufficient for escape against the Sheriff, and the last rule for special Bail was discharged.

Dominus Rex and King. Ante.

(47) INformation for refusing to be sworn Constable at Nortonferris, being presented by the Leet of the Hundred within which Wincauton is, the Defendant pleads that the Town is an ancient Borough, and have Leet of their own; and chuse Constables, Ratione Cujus, &c. to which on 13 Ed. 1. of Winchester cap. the Plaintiff demurred. This privilege of the Town F. N. B. 94. G. being no discharge as to the superiour Leet, which 10 H. 4. 4. & 2 Cr. 583. Croke and Stubs, being of larger extent hath a greater Jurisdiction, and that they shall enquire of the Inferiors, defaults, and Omissions is no excuse: also the Constables of the Town cannot present the want of Arms or such like; but they are present by the Constable of the Hundred, which 4 Inst. are within time of Memory: also the being Constables of the Town is but an excuse, pro tempore, not for ever, especially if there be not sufficient in the Hundred. Polixphen for the Defendant, that the Sheriffs Torn or the Leet of the Hundred 2 Inst. 122. F. N. B. 160. can only enquire of neglects of inferior Leet; but by particular custom two private Leets may be within one another; as Loder and Banwin 2 Cr. 551. and one have larger and the other have lesser Jurisdiction: But without a custom one Leet cannot meddle with the other; and here is no custom of the towns doing suit to the Hundred 21 Ed. 3. 3. Leet Br. 13. Also Leet Fitzh. 7. the resiants are 18 H. 6. 12. Marlb. cap. 10. and 2 Inst. 120. bound only to do suit to their own Leet not to superior. And Lambert 16 of Constables, saith the Hundred is the same with a private Leet, only of lager extent: Also the Leet of a Hundred or Borough is a Franchise within Winchester cap. and gives only power to the Hundred to chuse, not to take any out of the Borough: Also the usage is with the Borough; Hales Chief Justice said there was difference between a Leet in ancient Borough, who in Eyre appeared by four and was always looked on as distinct from the Hundred; and Leet in upland Towns is far different, and regularly he that ows suit to the Leet ows none to the Hundred, but by custom may do so. But chusing Constables is no Article of the

the Leet, and therefore the Hundred shall not be excluded as to this; for so by Cantling the Hundred out into Leets, as here it is, the Hundred would be destroyed, which may be as to the doing suit to it; but not as to this choice: Leet in the Kings hands is a Franchise in Subjects: And this being no Incorporated Borough, the being so in nomination, as Southwark, doth not exempt from being Constable of the Hundred; and contrary to 4 Inst. it hath been held a high Constable was an Officer at Common-law; though he had not view of arms. Hill. 16 & 17 Jac. Samoys Case, And Judgment for the Plaintiff notwithstanding it was excepted he is said to be chosen the 8th of October at the Leet, and the 9th of December he had notice, and being required by the Steward to take the Oath before the Steward (not said in Court) refused, which per Curiam is ill, but the Steward cannot swear but in Court; but it may be by a Justice of Peace, and the Constable when asket must go before a Justice to be sworn of himself: Also its said he refused to come to the Court, which is a sufficient refusal. Judgment for the Plaintiff.

Domius Rex and Lever.

(48) Peace.

ERror of Indictment of Barretry in Manchester Sessions, delivered at Lancaster Assises, was said to be on Tryal by Justices of Goal delivery; not said he was in Goal, which is clear on Indictment before Justice of Goal Delivery; but by 4 Ed. 3. cap. 2. the Justices of Peace are bound to bring their Indictments to Goal Delivery, and the Justices of Peace cannot try them, and if the Judges of Goal Delivery should not try them, they could not make out Process; which is the reason they cannot Atlaw any, but must certifie hither, but being not said ductus ad Barram, its ill; though against Commission, the Justice of Oyer cannot try: Br. 23. Crompton 226. b. But this coming in by Certiorari not by delivery of the Justices, he must be said in custody. Et adjornatur.

Prin *and* Beal. *Trin.* 25 *Car.* II. Rot. 1022. Ante.

(49)

IN Assumpsit the Defendant pleads that after the promise, and before the Action the Plaintiff became a Bankrupt, denying himself to Creditors, of which the Plaintiff had notice; to which the Plaintiff demurred, & per Curiam, payment to Bankrupt after notice is void, but if no notice, or

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if the party be compelled to pay by ſuit, as here before any Commiſſion ſued out its a good diſcharge. And Judgment for the Plaintiff; and anciently till Commiſſion ſued out, the debtor ought not to repay though he had notice of Bankruptſie.

Wildman *and* North. *Trin.* 25 *Car.* II. Rot. 357. Ante.

(50) Replevin. IN Replevin the Defendant avows for property in Barr; to which the Plaintiff demurred, becauſe this is but general Iſſue, non Cepit: as 27 H. 8. 21. and it ſhould be pleaded in abatement, as Replevin Br. 1. and ſo of the property of a third perſon, but per Curiam all is one in a Replevin where the party hath his goods delivered to him, its in Bar or abatement: Hill. 16 Jac. Salkield and Skelton which is reported but in part; 2 Cr. 519. pl. 1. but was adjudged he may plead it either and cannot plead non cepit, for he took the Cattle in queſtion, but not ſua; all that can be ſaid is that he ſhould have claimed property below: But notwithſtanding that becauſe the Sheriff might deliver the Cattle he hath election to plead it here, and 39 H. 6. 35. he ſhall have a return: Avowry Bar. 53. ad Idem, and Hull Rot. 357. the ſame, and Judgment of return for the Avowant in both, for the Plaintiff could take the Cattle unleſs Averia ſua, but on other pleas in abatement the Avowant muſt make title for return.

Benet *and* Thorn. Ante.

(51) Bail. PEr Curiam prædict. the Defendant for the Plaintiff Conceſſiſſet, being certified as the Recognizans its void, & devenit plegius is not ſufficient to excuſe the Officer alone. Sed adjornatur, as the latter.

Silly *and* Sedly. Error Br. 137.

(52) Error. POlixphen prayed execution notwithſtanding a Writ of Error, ad proximum Parliamentum 7 Jan. Raſt. Entr. 302. Latch. 57. Noy 76. and Worthy and Holt: And though the firſt Writ of Error abated by Prorogation at the day of the return of the firſt; yet as to the latter, that ſhall not make a Superſedeas, but per Curiam, here being no default in the Plaintiff, but as by the non venue of the Juſtices in Exchequer, and the Prorogation to a day ſooner than the next Term; there

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is no delay as was on return in the present Parliament on long adjournment as Roderigo Francis against Wadlow; and the same point was moved between Gofton and Sedgwick on Error return 7 Jan. proximum Parliamentum, by Sir Francis Winnington on 12 Jac. 2 Car. 341. Godsalves Case, that this Writ may be no Supersedeas to execution: but on 2 Cr. 534. Evesque Ossory: and 1 H. 7. 20. Flowerdews Case, the Court inclined its Supersedeas: and Hales Chief Justice said that the only difference between Prorogation and Adjournment was that Adjournment was before any Session; a Prorogation after, or that by general Prorogation all business determines, unless there be a special saving; but if Prorogation be to a day certain with any special saving, it differs not from an Adjornment but only in name, and so he said he had known it held by all the House of Lords upon debate. Adjornatur.

Thomas *and* Sorrel. *Thursday*, Novemb. 13.

IN Exchequer Chamber Justice Twisden de B. R. for the Defendant. 1. That the Patent 9 Jac. is good to dispence with the Statute 7 Ed. 6. cap. to a single person: And 2. he may do it to a Corporation: And 3. its not determined by his death, because a Tavern is a lawful Trade as 11 Co. every one is that keeps from idleness, and its antienter than the Common-law, as appears by Act. 28. 15. where the Apostles were met at the three Taverns, in appii forum; and on 1 Jac. cap. 9. of Alehouses which are the same to Tinkers that the other are to Gentlemen: Also this is especially out of the mischief of 7 Ed. 6. and with in the provision, of 12 Cr. 2. which doth not destroy them; but enacts, that only certain persons should licence. But before it was indifferent whether the Justice or the Mayor licenced: as on Dyer 303. of Aulnage; this was for ease of the people, that they be not without licence and all but one have agreed the King may dispence herewith. 2. Its not a void dispensation to a Corporation because its a Corporation; for its agreed the Dean and Chapter, or Mayor and Commonalty may purchase in Mortmain, notwithstanding the Statute: So 19 Car. 2. cap. 8. and as the generalty of persons therein; this makes nothing though supernumerary Taverns be Nusanses if more are in a Town than they will bear, and the last licenced are to be pulled down, yet these reasons do not assert this Case 2 R. 3. 4. the Patent shall not be void if it may be effectual. 8 Co. 15. The Earl of Rutlands (12)

Case; in dubious exposition that is to be taken, that is most agreeable to the rules of Law, as the grant of Park-keeper; not saying when, generally it begins presently, but this being not the intent, it shall pass in Reversion: So 21 Ed. 3. 55. Clerum & totum Clerum is all one, but to make a grant good its Clerum in each Province, so that Quilibet eorum shall keep Taverns, is intended only where the Common-law doth not restrain. Then in Rochester, if every Freeman should keep without licences they are out of the Statute, and may be suppressed by information, and they cannot justifie by their Patent: So of Alehouses, the Common-law hath set bounds to them; and its the same as to places in all Cities and Port Towns in England, are generall words, and must be restrained to fit places, as Brewers are lawful Trades: Yet in Hull its a Nusans, where in a close Street, and so it was adjudged by Chief Justice Bramston of a Brew-house in White-Fries he knew pulled down. So of a Butcher in a Chapel, or of a Tavern in a Church, these ill consequences are not warranted by the Charter: And 7. Ed. 6. doth not provide against keeping them in Back-lanes, but this is left at Common-law, which requires they be in open places, to which the Magistrate may resort; and though the grant be in perpetuity, yet is but to a particular Corporation: So its not Abrogatio Juris, as it would be if to every particular person. So for Transportation of Wooll to Callis, though it concern the Kings interest, he could not Abrogate the Law. And in the Countess of Pembrooks Case she hath Sherifwick in Fee: and in 20 H. 7. 6. & H. 6. 55. of exemption from Juries; and there is no difference between a dispensation with Statute, and with Common-law, so the matter be the same, F. N. B. 260. and its recited to be for the support of the Corporation; and the King could not Providere who should be Patentee; but he might see all the mischief. 3. This is no Delegation of the Kings Prerogative to the Corporation, but is the fruit and benefit of it which is done every day to every informer, for otherwise the King cannot delegate no more than his right hand, 7 Co. 36. & F. N. B. 271. and Register is to be understood of the Kings General in time of Battail to pardon, and we must distinguish between the capacity of the person to take; for he must be free, so that Quilibet eorum that can Write and Read, shall sell, is not given by the School-master that teacheth, he only prepares the capacity; and this else would void all priviledges of Corporations which are communicable to as many as are of the Corporation, as Prisage with 9 Jac. Walter and Hun-

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gar is grant to Corporation, yet granted to London to exempt others from Prisage is void; and its no matter in what the Prerogative consists in, whether in Revenew or other matters, for in no case the King cannot delegate his Prerogative, for then it would be absurd to call it a Prerogative of the King; another reason is that the grant that Aldermen shall be Justices that have been Mayors, as in London is good; And yet any may be free, and any free may be of the Common-council, and any of the Common-council may be Mayor, and though all these things must concur; its not Vigore Electionis only, but by the Kings immediate grant, so that every Master of a Company may keep a Tavern, this terminates in a single person, yet its no delegation of the Prerogative, else it were void; and the question is not de authoritate concedentis, but de re concessa & capacitate recipientis; the case framed of a grant, that all the Company should be Denizens, is litem lite resolvere. And the case of Brewers, that Quilibet eorum, notwithstanding 5 Ed. 6. cap. may keep an Alehouse, is equally doubtful, and they mutually prove each other; but neither are proved by reasons or authorities satisfactory. 2. This doth not dye with the Kings person, and its not like Protections which are Acts of Grace, or like the Cases of Commission: As Rolts Case Pl. Com. 455. which are in private capacity this in politick, and Dyer 270. is were there any time limited for the Duration, it should not determine. And Young and Wright, Debt on obligation to perform covenants in Indenture of Licence to keep a Tavern by King James, and confirmed by Car. 1. wherein it was resolved that the King might dispense: And 2. the point demurred on was that it did not determine by the Kings death. And this 3. was held to survive to the Defendant who was licenced joyntly with his Brother, and so it was no bare authority: and 2 R. 3. 4. is full in this point: on 5 H. 6. cap. 4. 27 Ed. 3. cap. 1. & 49 Ed. 3. cap. 1. and the point is not wherein the Kings Prerogative consists but whether this be a delegation of the Kings Prerogative, so as to put the Perogative into anothers power. And to Norris and Masons Case Hill. 1 Jac. its no answer, to say they were suddain, for often on opening the Record Judgment is given; and in Sir Walter Rawleighs Case 43 Eliz. the Judges being the same could not but know of the Vintners Patent, and held it good; and in my memory all my time in Fleetstreet hath been a Wine licence Office, which the Kings Counsel Popham, Noy, &c. would not have suffered had it not been before allowed: 3. The Statute 12 Car. 2. cap. 25. in letter and meaning is averted, if not lost per ni-

mium alterando, for hereby 7 Ed. 6. is repealed, but the Vintners freedom and privildege used is saved, and it could not have been by after words, they having those privileges before the Statute of 7 Ed. 6. which would be prejudice if taken away by 12 Car. 2. and the proviso is not flatering, as Pl. Com. 467 in the D. of Norfolks Case, and 2 Cr. 144. Molineux Case, such priviledges is all one as if particularly named; and the Charter being good these were lawfully used. Turner Chief Baron for the Plaintiff: 1. That that Patent was void in its creation, wherein he considered the Nature, Reason and original of non obstantes, which is relaxative, 12 H. 8. 16. Mali prohibiti necessitate & utilitate pensata 1150 in King Stephens time set up by the Pope, Davis, 71. Hub. 250 Prins Animadversions on Records. 2. The matter thereof is foreign, Inst. 1. L. 2. §. not to be admitted unless necessity of Merchants or common utility do recompence: 28 Ed. 3. cap. 7. 42 Ed. 3. cap. 6. in 2 H. 7. 6. & 7 Co. 14. The King may dispense with Laws that concern him: 28 H. 8. cap. 13. of Piracy Hub. 146. and its proprium quarto modo, to the King, as to command any Subject to serve him for the publick good; 12 Co. 18. and he doth make Judges Circuit in their own Counties: Also Statutes that are against the Kings Prerogative 7 Co. 24. may be dispensed with: 2 H. 7. 6. He may pardon murder, because in Mercy and Power, the King cannot be restrained, Hub. 146. but as Davis 75. & 5 Co. 28. he cannot dispence with Malum in se, or with acts of publick concern, as with the Statute of the Admiralty 4 Inst. 135. he cannot 2 R. 3. 12. dispence with Statutes in which the Subject is equally concerned with the King: So 33 H. 6. 5. Hub. 214. non obstante, the Statute of 32 H. 8. was held good for ministerial place, but not for judicial, in which the Subject hath interest, so of non obstante contra 4 Co. 35. to Common-law: Also non obstante cannot restore or dispence with Symony 1 Inst. 120. Com. 502. or particuler disability: Also 5 Jac. for the Controuller of the Kings houshold, by Sir Arthor Ingram was held void notwithstanding non obstante, 5 Ed. 6. and given to Dorrel; and the Patent 9 Jac. in question, regulates not the disorders taken away by 7 Ed. 6. for all the penalties are given to the same Corporation, that by 7 Ed. 6. were not thought fit to be trusted with the number or places thereof, and at the time of 7 Ed. 6. there were no places but near London, where any would set up Taverns, had they had licences for nothing; but now the number of Inhabitants and Towns are increased; and so the Law is enervated, though properly it cannot be abrogated but

but by another Statute; so of non obstante given to Graziers to import Irish Cattle, it would be an avoidance of the Law to pardon, which is ex parte post may be inseparably of malum in se by the King; but a Licence which is a parte ante cannot be of malum in se; and the Case of 2 R. 3. 4. is of the Kings particular inheritance and interest, which he might have pardoned or licenced to go to other parts: Also 14 H. 6. cap. saith expresly the King may modifie that, therefore its no precedent; and the cases of Norris and Mason were sub silentio, which in case of Prerogative would not be passed over: and neither Moor nor Brownlow that report the same time mention them not, nor did they ever come before the Court, but were probably entred by Collusion. 2. Admitting this Patent good, its determined by the Kings demise, being but bear authority; but if it were an interest, it would continue; so where its mixt with an authority that is presently executed, as in grant of Forest in pardon or in office of Collector of Disms, being grant out of the Kings inheritance, they do partake thereof and are not determined by the Kings death; but in our case the King had no continuing interest, therefore the King could give none out of his pubick authority: Also the licencing all to whom Sir Walter Rawleigh gave licences to sell, was the same to a particular person, as this is to the Corporation, and this is as much an inherent power in the Successor as in the Predecessor, therefore is alterable by him. As to the 3. point 12 Car. 2. cap. 25. destroyes 7 Ed. 6. wholly, and consequently the Vintners power if ever good, which is left to construction of Law, and neither made good nor bad by this; for the house of Commons will not give judgment on the validity of the Patent, but only leave it as it was at Common-law before without prejudice by this Act, wherefore though this were a mixt authority, yet being always executory as to the persons that are licenced, its gone by the Kings death, and for that such provisoes are delivered by particular persons on the reading of the Bill to the end only that they should not be concluded by that present act; not by the care of the Parliament to secure against any mischief, therefore it avails not. And Judgment for the Plaintiff.

White

White *and* Randal. *Monday*, Nov. 17.

(54) Common. NOte that after several motions to settle Issue, so as to bring right of Common in Question, in Replevin of taking in Elsted-Marsh, within the Mannor of Trotton, tryed at Bar on Friday last, the Defendant avowed by protestation that the locus in quo was parcel of the Mannor of Elstead, and of Trotton: For plea justifies for Common to ancient house in Elstead, and the Plaintiff to have return saith he hath ancient house in Trotton, and that he, &c. have used to have Common in the said Elstead-Marsh, and farther saith that this is parcel of the Mannor of Trotton, absque hoc, that its parcel of Elstead Mannor, and this was because this Marsh was partly within the Parish of Trotton, though within the Mannor of Elstead wholly; and upon Evidence for the Defendant the Plaintiff was Nonsuited, and Damages awarded by enquiry at Bar.

Istead *and* Streater.

(55) Error. JOnes yesterday sworn the Kings Solicitor (in place of North, made Attorny in the place of Finch, Made Lord-Keeper in Lord Ashlies stead, Removed on Monday last from being Chancellor) prayed Execution on a Writ of Error brought in Parliament, and discontinued by Prorogation, which Wild and Raynsford granted, the Record being never carried hence nor transcribed.

Warn *and* Sandown. *Trin.* 25 *Car.* II. Rot. 1081.

(56) Sheriffs. IN debt on obligation the Defendant pleads that Roberts was imprisoned, and this Bond was given by him and the Defendant for enlargement; to which the Plaintiff demurred on Cr. 187. Huscombe in Dures Br. 1. and Mantell and Gibbs, 2 Brownl. 64. Dures Br. 9. & per Curiam Judgment for the Plaintiff; this Robets being no Father, Husband, Wife nor near Relation, in which cases the Bond would be void.

Hobday

Hobday *and* Oxenden. *Trin.* 25 *Car.* II. Rot. 65.

ERror of a Judgment in Canterbury, in debt against the Defendant as Administrator, on plene administravit pleaded, and Verdit of Assets, to part the Judgment is quod recuperet so much de bonis Testatoris as found, which was assigned by Pemberton; & per Curiam, it is Error for the Judgment should be generally quod recuperet debitum & quod habeat Executionem only for what is found de bonis propriis, & per Curiam, the rest might have been releast below and so it might be good, but it cannot be releast now. Sed adjornatur. (9) Administrators.

Pibus *and* Mitford. *Tuesday*, Novemb. 18. Ante.

EJectment in Northumberland, special Verdit find Mich. seised in Fee, and had Issue by Jane his second Wife Ralph; And after covenanted with Delavall that he and his Heirs should stand seised to the uses of the Indenture, as to the Lands in Royal, not in Question, to himself for life, and to the Trustees for years, which is void: the Remainder to Ralph and his Heirs Male. And as to the Lands in Heton, which are now only in Question, they find it was to the uses of the Heirs Males of Mich. begotten or to be begotten on Jane; The remainder to his own right Heirs, and concludes specially that if any use be raised by this Indenture 21 Jac. to Ralph the Son by the second Ventre, for the Defendant, if not for the Plaintiff, the Heir at Law, by the first Wife. Sir Francis Winnington for the Plaintiff, that this Covenant being as to part not in question to Ralph by name, and his Heirs Males; and the other Acre in question only to the Heirs Males of the Covenantor conceived 1. that a future use may rise on contingent by 27 H. 8. cap. 10. after death of the Covenantor: So Pl. Com. 300. Sherington and Pleadals Case, though it were not such a Covenant on which an action of Covenant would lie against Executors, and notwithstanding this is no barring the Heirs without the Covenantor. Co. Lit. 386. Hub. 330. & 2 Roll. The most material point is if this by implication gives the Covenantor for life, so as to make it an Estate Tail executed, and as to this both the (11) Estates.

the Sons being then living, and named in the settlement the Covenantor manifestly had no intent to raise any new use to himself, as where its by transmutation of possession. 1 Co. 154. Snr. Pagets Case there is for the several reports in Moor 193. pl. 343. but best 1 Anders. 263. pl. 270. do much differ, and there was no use raised by Implication to the Covenantor; but upon his old Seisin the uses being not well limited resulted to himself: And 2 Co. 91. Moor 284. pl. 437. & Co. Lit. 22. b. Fenwick and Mitfords Case is rather this way, for the Conusor had conveyed it to M. for life, &c. the Remainder to his own right Heirs; by this limitation a use resulted, with power to lease, so that his Heir was no Purchasor as the most held: but some held this was a fee-simple, and therefore may as well be limited to the Heir of the Conusor as to any other, else the limitation to his own Heirs is void, and he hath the old use; and so in the Case at Barr the Covenantor having only his old Estate, that cannot be coupled with the use to Ralph, to make an Estate Tail executed. 2. From the form of the Deed it appears that no use can rise by implication, which is Ousted by the express limitation of the Lands to Ralph for life, Remainder to his Heirs Males; and hereby the covenantor takes notice of such limitation granted to A for life, 24 Ed. 3. 70. b. & 76. Remainder to B. Remainder to the right Heirs of A. here being an Estate in the Ancestor the Heir takes by discent, but where he hath no Estate, as in this Case they must take by Purchase: And 3. Ralph cannot take as a purchasor, here being no Will but on Deed, Hub. 31. Its true on W. 2 cap. 1. the Heir by a second wife may take an Estate Tail, though the Son of the former be living; but still this is where the Ancestor had an Estate before, not else by bear description: and Dyer 156. b. Greswalls Case, Feoffment to A. for life, Remainder to the Heirs of Feoffor in Tail; Remainder to J. S. in Fee, was held void as to the Entail, and no implication that the Feoffor should take; but its true this was not by way of use, but by Feoffment at Common-law, which by Hales Chief Justice will be very different. Sand. for the Defendant, that a use vests in Ralph, yet he takes not purely as a Purchasor, being no compleat Heir: Co. Lit. 10. & 164. And this was contrary to the Deed, that the Heir Male should take by Purchase, which would exclude the others; but this shall rise as future contingent executory use, and then he is in Quasi by discent of an Estate Tail. Its agreed use may be so raised; as 3 Cr. 439. Woodlif and 2 Cr. 108. & Pl. Com. and that in some cases an Heir shall take Quasi by discent. 2 Roll. 794. & 1 Co. 100.

Shellies

Shellies Case is plain, though the Ancestor could never take, and there is no distinction when this act is to be done, where its to be after death of the Covenantor there was no possibility he should take; and had the use been to Mich. and his Heirs; and if he had Issue by the second Wife, to the Heirs of the body of such Wife; this is a base Fee till Issue, and then vests in the Heirs of the Wife: and there is difference between act of party and construction of Law. 2. Upon sealing the Deed, the use did change, and Mich. was presently Tenant in Tail; for the construction of uses differ from Common-law, as Covenant to use of himself or his Wife are good, yet there can be no such gift at Common-law: Also the covenantor hath the whole use, and what he doth limit over is reserved to himself, and that by this implication may raise a use is plain on 1 Leonard 256. pl. Manning and Andrews, Where after death of Joan Remainder was over, it was adjudged Joan had for life, though she were a stranger and had nothing in the land nor use before. And in Co. Lit. 22. Fenwick and Mitfords case, it was held that the old use remained in himself: so Moor 718. pl. Earl of Bedfords case, which was after: and 1 Co. 154. Lord Pagets case differs not from the case in question; and the limitation to Farmor, and Sanders were not regarded, nor nothing passed from the Lord Paget, who is said to have but for life, because its expressed immediately after his death to J. S. Also were there a Chancery trust in this manner to heirs Males, by the second Wife, they would conster this, that the Donor should have for life, but no other Estate; though Mich. might by act in his life time have destroyed this; and where the covenant is on future Marriage to stand seised after Marriage be, till then hath fee; but where it is to another after death of the covenantor he shall have it but for life, and to a mans heir, and to J. S. or heirs on death of Ancestor is all one. And Co. Lit. 22. because the right heirs cannot be purchasors, nor take till after death of Ancestor: Therefore the Ancestor shall take for life. Hales Chief Justice, The Judges are to be astuti pro veritate to construe according to intent, and he saw no difference between Fenwick and Mitfords case, which was the same family; heir and Ancestor are Correlative, and therefore the heir cannot be purchasor; and Lord Pagets case was truly adjudged on the reason of Sanders, because the Lord Paget had an Estate for life; else the Son could never have had an Amoveas Manum: this implication shall knit both Estates together, especially being in case of an Estate Tail, where Volutas Donatoris hath been largly extended: Also the covenantor could not stand seised,

and its not as Covenant to ſtand ſeiſed to the Heirs of I. D. by a ſecond Wife, this is a Fee-ſimple in the Covenantor till the contingent riſe; and Moor 718. pl. the Earl of Bedfords Caſe according, and here being a long enjoyment it ſhall be as a Covenant after his own deceaſe to ſtand ſeiſed to the Heirs Male by the ſecond Wife, in which Caſe the Anceſtor hath ſuch an Eſtate as may ſerve the Remainder, this being no contingent, as to ſtand ſeiſed on Marriage, or after the death of I. S. which is Fee in the Covenantor till the contingent happen; which the other Juſtices agreed, beſide Twiſden, who held this not being in the Caſe of a Will, nor no poſſibility for the Heir to take by purchaſe, he cannot take by deſcent, being contrary to the rules of the Common Law, where the Anceſtor could never be ſeiſed. Sed Adjornatur.

Collins *againſt* Mathews.

(59) Slander. OF an Inn-keeper, I ſee Cook lie with Samuel Collins's Wife, by which he loſt much gain and cuſtomers, per Curiam is Actionable: but this being an Action brought by the Husband and Wife, and damages given to them both, its ill, for the Wife cannot joyn in the damages, & ad damnum ipſorum were ill, and Judgment for the Defendant.

Lord Fitz-walter *and* *Modern* 105. pl. 14.

(60) Fiſh. EX motione Sir William Scrogs againſt a new Trial. Hale Chief Juſtice ſaid, That Wears as in Suffolk and Norfolk may be particular in the main Sea, 35 Ed. 1. Rot. 18. & Tr. 10. Ed. 2. Rot. 83. or on the ſhore, and yet the Fiſhing may be and is common to all ſubjects: ſo in the Severn to the Lord Berkley, and in the Thames from the Bridge to Rocheſter, though the Soil be the Kings, yet prima facie the Fiſhing is in the ſubject, but one may have a Piſcary in particular, excluſive of others in common River, and on releaſe of damages to 42 s. Special Verdict ſtands for the Plaintiff on trial at the Bar in Action upon the Caſe, for diſturbing his ſole and ſeveral Piſcary in Burnham River in Eſſex, from Clay-Clods to Ray Sands, near twenty Miles length; and the Plaintiffs evidence was on Thurſday laſt, by making many Wears ad libitum, the Fiſhers by uninterupted Fiſhing.

Jefferſon

Jefferſon *againſt* Dawſon. *Wedneſday*, November 19. Ante.

NEwdigate prayed delivery of poſſeſſion might be awarded on an Elegit; which the Court denied, the party having no day to interplead: and the Sheriff ought only to deliver ſeiſure to enable the Plaintiff to maintain Ejectment, and the Tenant may plead on the Ejectment, and elſe the Tenant would be turned out unheard and remidileſs: therefore per Curiam actual poſſeſſion ought not to be delivered, yet if done, its remedileſs. (61) Execution.

Mathews *againſt* Bowtel. Ante.

HOlt prayed Judgment: 1. Becauſe this Twitchel is ſaid to be a neceſſary place to ſet Ladders to repair, its ſufficient to ſay that the Plaintiff was poſſeſt of an ancient Houſe, and that he and all thoſe whoſe Eſtate he hath, have uſed it to ſet Ladders for repair, without direct and ſpecial preſcription in the Houſe or the Twitchel; To which the Court inclined. 2. As to the lights, per Curiam, they muſt be ſaid to be ancient in this Caſe, ſo where they are ſtopt by Building in Ground adjacent. But Hales Chief Juſtice ſaid he had known it ruled in evidence often, That in Action upon the Caſe for ſtopping my new lights with Board or other Inſtruments, they need not be ſaid ancient; alſo where old light is enlarged, it can only be ſtopt by new Building as to the enlargement, not to the whole light; yet the Action may be for ſtopping the whole, but damages ſhall be only as to what is old light. Adjornatur. (62) Nuſance.

Auſten *and* Lepincot. *Thurſday*, November 20. Trin. 25 Car. II. Rot. 850.

SPecial Verdict in Ejectment they find Francis the Grandfather aſſigned to Truſtées for life, the remainder to the uſe of the Father, and after to the Son for lives, and Covenants therein to pay Annuity to the Father; after which the Father releaſeth all Annuities given by that Indenture, and all Arrears, and all other Titles, Debts, Suits, Claims and Demands, which by the ſaid Indenture or other ways, he or his Adminiſtrators might or could have from the beginning (63)

ginning of the World, before the date of the release; after which the Grand-father leaſt to the Defendant; after which the Father entred and made a leaſe to the Plaintiff: and whether this Release by the Father paſs this Eſtate for life was the Queſtion. And Polixphen for the Plaintiff that it doth not, there being no mention of Land or Eſtate, but only general words before the Date of the Releaſe, which intended not to Releaſe any Remainder after the death of the Grandfather, and by the words demands no ſuch Eſtate can be Releaſt, 3 Cr. 268. Seaman and Oxendens Caſe, and the word Titles Pl. Com. 484. & 8 Co. 153. ſtrictly and properly is a Lawful cauſe to what another poſſeſſeth, or Title of Entry for Mortmain, and in this ſenſe it ſhall be here taken, and not in the general ſenſe for all rights: For had this been intended it would be expreſt before the Grant of Arrears, and the Annuity is the principal, and therefore all Titles ſhall refer to that, as the Marquis of Wincheſters caſe, 3 Co. 2. general words refer to the ſubject matter on Attainders, or Deeds of Grant: as Calies Caſe 9 Co. ſpecialties are bona; yet theſe paſs not, Yelverton 68. So Deer in a Park are Averia, yet ſhall not paſs by omnia bona, 18 Ed. 4. 14. So all Commons is intended in uſual places: ſo a Releaſe of all demands diſchargeth Rent charge, Lit. Sect. 510. 2 Cr. 318. pl. 9. yet in Hen and Hanſons Caſe, by the words of demands a right is not Releaſt: and Averies Caſe by Hutton, Hetly 15. pl. an Acquittance of all Actions and Demands diſcharge not Annuity, and 2 Roll. 509. Sect. but refer to what was intended in particular, ſo Titles ſhall be taken for ſuch Titles, for which he might have a ſuit. Maynard for the Defendant, abſente Hale Chief Juſtice, the Inheritance being to the Heirs of the Father, it comes to the Son without diſturbance, and a Releaſe of all demands will not extinct a growing Rent, but only the arrears; but a Releaſe of all demands out of Land, that might extinguiſh the Rent, but generally doth not extinguiſh Rent nor Covenant, unleſs broken; but the pinch of the Caſe is on the word Titles: for the Arrears and the Annuity it ſelf, though expired, are releaſt, and all other Titles by that Deed, and he had no other Titles by that Deed but this; ſo its as Releaſe by the Son to the Father; & per Curiam Title is a proper word for Lands, and to carry an Eſtate, eſpecially being further by vertue of that Deed; and an Eſtate pur auter vie, as Co. Bouls Caſe, may be in Remainder after his own life, ſo its uſual conveyance to A. for life, the Remainder for years being leſs Eſtates. Sed Adjornatur.

Wilſon

Wilson *and* Robinson. Trin. 24 *Car.* II. Rot. 1415. Ante.

EJectment of Lands in Westmorland of three Messuages, as to two, not guilty, as to one, that it was customary of the Manor of Underbarrow, and devisable, and that Baldeston devised all his customary Tenant-right Estate at Brigend in Underbarrow to his Cosin the lessor of the Plaintiff: and whether this pass for life or in fee was the Question, and is the special conclusion of the Verdict: And Levins for the Plaintiff that its but for life: and Wilkinson and Merrylands Case, 1 Cr. 447. is of Mortgages and Estates, and there said, That if it were of all Estates in Land it would pass a fee, and in 1 Roll. Hill. 649. Kerman and Johnson, in Stiles, it was paying Debts and Legacies; which by Hales Chief Justice was ex abundante, found to expound the Will by these, exceeding the value of the personal Estate. But the Court adjudged that a fee passed by all the Estate; also Bowman and Milbanks Case, All to my Mother was held but for life; also the Marquis fee, and on the Beckside, and which my Father took of Hinbesty of the Kings Lands are but several descriptions of the Lands, being intended several, not any passing the Estate, but all subject to the same construction, 1 Roll. 844. Moor pl. 153. being all but one Devise, so as the one will not carry a fee, no more will the other carry any Estate of Inheritance; also in the same Will is Rent devised to the person for ever. (64) Devise.

Weston for the Defendant, that Inheritance passeth Estate comprising every Interest in Land more or less, and nothing is left to descend to the Heir, therefore the Devisee must have it, as where its devised for ever, which is the same in point of time: and 1 Cr. 447. Merrylands Case, all Estates among other personal Legacies being associate made the doubt, but in this Case all the Estate is single alone, and without doubt all his Inheritance would pass a fee, and all the Estate is of the same import, and the addition of all his Tenant-right Estate alters it not, but describes the nature of the Land, as to the qualities of devise, &c. Hale Chief Justice, had the Verdict found for the Marquis fee, and that purchased of Hoberston, and on the Beckside, to be all Tenant-right Estate, then the devise of all his Tenant-right Estate at Brigend would pass a fee; but being not so found, the devise of the Tenant-right Estate seems to describe the Lands only, and so

so only for life passeth, and the special conclusion aids nothing in this uncertainty: Which the Court agreed. So on devise to A. in fee, Item to B. was by Noy argued to be fee to B. by the item, which per Curiam was held but for life: and Richardson Chief Justice said, That should it be an Inheritance, that would make the Item an Imprimis.
Also the Court agreed that a devise of all his Tenant-right Lands would be but for life, but of all his Estate carries fee. Sed Adjornatur, the fact being that all was customary Estate.

Norman *and* Foster. Trin. 25 *Car.* II. Rot. 436.

(65) Covenant.

IN debt on Obligation, the Condition to perform Covenants against all claiming Title; the breach is that Bowel clamando titulum, not saying what, entred; to which the Defendant demurred, not being said, Habens titulum after the time of the Covenant, which was to enjoy against Foster and I. S. and all others claiming the same, ante tunc & ib. free of all incumbrances under them, which is a new Covenant, & per Curiam on 2 Cr. 15. Kerby and Hansacre, 2 Cr. 10. Buckland in Covenant against one Man is broke by entry, habens titulum; but here being against all persons claiming Title, the particular Title must be shewed, and that lawful, and that its not derived from the Plaintiff himself, or his lessor, &c. For Tisdale and Essex Case, Hub. 35. pl. if under the Plaintiff, be it a lawful or unlawful Title, the Plaintiff is bound, Dyer 328. Moor 861. pl. and the Covenant that he hath power to lett, is as to the Title, and that it shall be enjoyed free, &c. which is as to the possession 2 Ed. 4. 15. and 18 Moor 307. pl. and Moor 331. pl. Dyer 42. pl. and Leonard 451. pl. Foster 2 Cr. 21. contra to Yelverton 30. Chandflower. And entry by I. S. habens jus under I. S. before the time of the Covenant; and Wortton and Hales habens legale titulum was here void after Verdict on warranty by Fine upon conceſſit; all which Cases were because it might be by Title lawful or unlawful under the Plaintiff himself, and the Court inclined strongly for the Defendant. Sed Adjornatur.

Winter

Winter *and* Allen. Ante.

NOte that depending Error in the Exchequer-Chamber, the parties compounded that the Plaintiff in debt on Judgment, in debt on Obligation, to which the Defendant had pleaded voluntary escape in bar, should have the penalty of the Bond, and remit the costs; ut Dicitur. (66) Debt.

Dominus Rex and Martel. *Friday*, Novemb. 21.

SHouldham excepted in arrest of Judgment in Information here, under the name of the Attorny General against the Defendant, for using the Trade of a Draper in Norwich; being not brought, though it be laid and tried in the proper County, on Yelverton Barbers Case, and and staid quousque, &c. by Rainsford and Wild; but the Clerks said the constant course hath been to bring them here since 21 Jac. Cap. 4. (67) Information.

Claxton *and* Laws.

IN Trespass of taking the Plaintiffs Bull, on Verdict for the Plaintiff 25 s. damages. Tremayn prayed full costs; whereupon it was referred to the Secondary to confer with the Prothonotories of C. B. and on their report per Curiam no costs shall be allowed: and costs was denied. (68) Costs.

White *and* Coleman, *in* C. B.

TResPas of taking and chacing two Mares in Launceston, as to entry not guilty, as to the taking in Cumbleford Mannor, justifies Damage fesant in the Parish of Lantegos, as the Kings Baily, sans ceo that he is guilty at Launceston where its laid. The Plaintiff replied, That Cumbleford is an ancient Borough, Incorporated with power to implead, and that the Corporations pro ipsis & inhabitantibus have the Common of Turbary out of the Moor, in which the Trespass is supposed to be expended by the Inhabitants, quilibet ad libita sua, every year in their Houses, and that the Plaintiff was and is an Inhabitant of an ancient Messuage, and took these for reasonable Estovers: The Defendant (69) Corporation.

dant rejoyned protestando that they are not reasonable, and for plea traverst the prescription; and Verdict for the Plaintiff: And Baldwin excepted in arrest of Judgment that this prescription by the Mayor and Commonalty for the Estovers, in quibuslibet Messuagiis suis within Borough; not said he is a Burger, and the Plaintiff also is only said an Inhabitant in the Borough, no Tenant to the Corporation nor member of it, is too general and incertain, this being no Common known in our Law, being not extinguishable or releasable, the Inhabitants may prescribe in easements, not in Estates, as here; nor were this good by way of custom, which is much stronger: its not good as Common, Bulst. 6. Co. 60. Gateways Case, and 7 Ed. 4. 26. Common Br. 8. and 15 Ed. 4. 3. and 18. H. 8. 1. Prescription for Corporations is not good for the Inhabitant, unless averred the Tenant, nor is this for ancient Messuages or ancient Chimnies, but includes all new Buildings; also its not for reasonable Estovers, but ad libita sua, which in this Moor being but 100 Acres is void. 2. The Trespas is at D. apud Launceston; the Defendant justifies in the Parish of Lantegos, absque hoc that he took them at Launceston, which is as to place a departure, as 43 Ed. 3. 11. pl. 2. is as to time.

2. Serjeant Barton for the Plaintiff that this is waved by taking Issue on the prescription; sed Curia contra, that this is a plain departure. 2. As to the prescription it self, in 15 Ed. 4. 29, & 32. the Mayors of Coventry are directed to prescribe thus by the Mayor and Citizens for the Inhabitants, which placeth the Interest in the Corporation, though the Inhabitants take benefit thereby; and this is not applicable to new Houses as laid to be time out of mind, which is only applicable to ancient Messuages, and 1 Bulstr. 93. Douglas and Kendals case, it need not be said ancient Messuage, and Latch. 110. & 3 Bulstr. 334 Harrisons case, but its sufficient to say he had it time out of mind; Sed per Curiam the Case of Coventry was for Cattle levant, and couchant upon ancient Messuage, but though where the prescription is to Houses they must be said ancient; yet per Curiam not so where the prescription is by Corporation; also though the Inhabitant cannot prescribe, yet he may have benefit of it; and so of a Copyholder if his Cattle especially be levant and couchant: and every Borough hath a certain extent, and are not confined so as they may not have more Houses or Burgesses, and the Common is not personal, but granted to them according to the extent of the place, and there is no wrong done to any. But by Windham the Common of Estovers would not be good to

the

the Land, and consequently not good to the Houses newly erected on the Land. But by Vaughan and Atkins by special grant Burgesses may have a Common within the Borough for all Houses built and to be built; therefore this being by Prescription, is stronger; also the Common is increased by increase of Burgesses, and may be as well to increase of Houses, and there is no difference as to this between a Common of Estovers and a Common of Turbary; but Ellis absente. Adjornatur: But all held the departure fatal.

Saturday, November 22.

NOte by Hale Chief Justice in trial yesterday at Guild-Hall, that the Sheriff may send an Accedas ad Curiam by a Servant, and need not deliver it in person, as Co. Burwels Case, contrary to what Barwel urged for special Verdict on Registre 9. b. F. N. B. 70. B. (70) Sheriffs.

Caul *and* Llemark. Ante.

ERror of a Judgment against Bail on Recognizance taken before the Mayor, secundum consuetudinem, not said in Court; which by Jones Solicitor is well enough, being said on Record, and its sufficient Record when on Record, wherever taken, the Mayor being the sole Judg for ought appears here; so Bail before a Judg here out of Court, when brought in is well enough: Sed Curia contra that these Bails mention before what Judg, and so should that, and not doing it is Error, not alledging custom to take it out of the Court, and Judgment reversed. (71) Bail.

Prideux *and* Wain. Trin. 24 *Car.* II. Rot. 1472.

IN Replevin the Defendant avows as Lord of the Mannor of D. for Bushellage from Hipperpoint to Wade-Bridg, which is out of the Mannor 7 Miles, in consideration of repairs of the Key within the Mannor, where Ships usually unlade, without saying that the Ship in question came to the Key; to which the Plaintiff demurred, this being not like the Case of Dublin, 2 Roll. 565. where they set up lights, and such Toll as this cannot be appropriate without sufficient consideration, 41 Eliz. Lane 25. Davison and Herd, (72) Toll.

the grant of a Port is not good; but as to Anchorage or Keelage there may be a prescription ratione soli, but not so for Bushellage; also its unreasonable to distrain the Ship for non-payment of duty by the Merchant; also the Sails or Kirl is a necessary part of the Ship, and is not reasonable; Et per Curiam the prescription might as well be for all Ships in the Sea, and being not said that the Ship came to the Key or within the Mannor, it cannot be taken of a stranger without limits, a subject may have a Port, as Saltash, Apson belonged to the Earl of Devonshire, and Foy belonged to the Earl of Cornwal by grant or prescription, but they cannot exclude the subject coming thither, nor the King from the guardship of it: and Valetot in Devonshire belonged to a subject as to the Soil or benefits by it. 2. The distress is unreasonable to take the Carriors Horse for the Corn of the debtor. Anciently for old customs of Staple Commodities, the King might seise the Ship, but he cannot do so now, unless by special Act of Parliament. Adjornatur.

Rose *and* King. Trin. 25 *Car.* II. Rot. 309. Ante.

(73) Trespass. TRespass of throwing down Hedges continuando, it was excepted that this cannot be, but per Curiam as pedibus ambulando, or feeding, which are not the same, yet lie in continuance, so of prostration of Hedges, though of breaking House or Close, or cutting Trees there is no such continuance, importing only one single Act: viz. the first Entry, so Letchford and Elliot throwing Logs cannot be continuando, but a Hedg may be of length, so continuando is good, and Judgment for the Plaintiff; but per Curiam the plea, though ill pleaded, is sufficient in matter for justification, and may be given in evidence in mitigation of damages.

Bennet *and* Thorn.

(74) Bail. THE custom is only to become a pledg, and that if the Defendant pay not the debt the Bail will, its sufficient to say devenit plegius on 1 Roll. 563. & 2 Roll. to excuse the Officer being only orderable; which the Court agreed, but had not the custom been pursued where void it would not excuse, but here the setting forth the special Recognizance which

which is void, yet shews what pledg is required, which is not pursued; & devenit plegius, generally is only for appearance, whereas this is to pay the debt or render the body; also the Mayors Act of taking Recognizance cannot excuse, unless there be such a Recognizance on Record, which is not, and in Piers and Deavon, Hill. 24 Car. 2. not alledging a plaint was adjudged Trespass in the Officer, and Judgment for the Plaintiff. Nisi.

Rogerson *and* Jacobson.

ERror of Judgment in Norwich in debt on Obligation infra Jurisdictionē to pay at Alborough which is out; the Defendant confest the Bond, and according to custom prays Enquiry de justo debito, which is granted, and the Error assigned that they enquired of debt out of Jurisdiction, and no special custom returned, but only secundum consuetudinē, which in case of trial by sir was held void, yet this may be good by special custom, so on solvit ad diem the place of payment would appear out, but here it doth not, and therefore Judgment for the Plaintiff affirmed. (71) Lieu.

Peters *and* Prideux.

IN Libel for Corn minus voluntarie sparsis; to which the Defendant pleads that it was fraudulently scattered, and that hereon sentence was for the Defendant in the Prohibition. And Polixphen prayed a Consultation, because the refusal of the plea of fraud is triable at the Spiritual Court, though the fraud be at Common Law. (72) Tithes.

Dominus Rex and King. *Monday*, Nov. 24. Ante.

SYmpson excepted to the Information that its ad Curiam tenēt, not said Coram Seneschallo, as Rast tit. Amerciament, and Co. Greislies Case should be. 2. Debito modo elect is too general and incertain. 3. It should be existent idonea persona in the Information, and not the party put to shew his disability. 4. Its said he was Summoned to appear before the Steward, not said in aperta Curia. 5. It was recusavit & denegavit, and its not said the Steward tendered the Oath; sed non allocatur, for denial and refusal, having notice of his Election, & requisitus in Curia to appear be- (73) Constable.

foꝛe the Steward its well enough, as neglexit, and the not saying the Court was holden Coram Seneſchallo is informal, but aided by confeſſing the debito modo electus by pleading o-ver. Sed adjornatur.

Pierſon *and* Nicholſon.

(78) Taxes.

SIR William Jones conceived a Cutlers Foꝛge a Fire-hearth within the body of the Law, and not within the exception; foꝛ the Blowing-Houſes are places known among the Tin-Miners in Cornwal: and though the Special Verdict do find that this could not be uſed without blowing. So a Stamp-Furnace is only foꝛ making Backs of Chimnies, not that every making a Stamp on any Iron will denominate a Stamp-Furnace. Hale Chief Juſtice ſaid, that in the forme-er Caſes it was expreſly confeſſed that a Smiths Foꝛge was a Fire-hearth, ſo this queſtion was out of dooꝛs, but now the queſtion is cleared, therefoꝛe its fit to examine the Wool-Combers Clay-Furnaces, into which they put their Combs; and the Barbers Stands that are fixt; and the Felt-makers and Silver-Smiths Foꝛges foꝛ Enamel, and Pewterers Melting-houſes, and Glaſs-Mens, and the very Cooks Boyling-pots that are fixt, and Chimical Limbecks and Furnaces, all which would be let looſe by ſuch an expoſition and foꝛced to pay; ſo of little holes made to ſet Diſhes in Gentlemens Houſes: there would be no end of ſuch expoſition; and the Court inclined this was not within the Act. Sed adjornatur to hear Artiſts.

Dominus Rex and Hays.

(79) Information.

ON Habeas Corpus ad ſubjiciendum, &c. if one be Remanded he cannot be ſent back charged with Actions, but muſt have new Habeas Corpus, and it appearing on the Return that he and his Son an Infant had ſtoln and married a City Oꝛphan, and was Fined 500 l. and now it appearing that there were other Actions charged on him, the Court committed the Father to the Marſhalſea until he found Bail, and Remanded the Son. And by Hales Chief Juſtice, Entry of a Committitur is ſufficient to charge the Priſoner with Actions, oꝛ in Execution, though he be not actually in cuſtody; but its not ſufficient to charge the Officer foꝛ an eſcape unleſs actually in cuſtody.

Veſque

Veſque and Daniel. *Wedneſday,* November 26.

DEbt on Obligation the Condition to perform an Award, which was that the Defendant ſhould pay, and that thereon ſhould Seal to each other a good and ſufficient Releaſe in due form; to which the Defendant demurred, becauſe its not ſaid of what the Releaſe ſhall be, but per Curiam this is intended of what is ſubmitted, but if it had been to Releaſe all Actions to the time of Award or payment, it would be ill; but Judgment for the Plaintiff. (80) Arbitrement.

Bokenham *and* Thomſon.

TRover de diverſis rebus aided after Verdict, per Curiam in Error of Judgment in Aſſumpſit in C. B. (81) Trover.

Mathews *and* Bowtel. Ante.

HAle Chief Juſtice there is no cuſtom alledged to put the Ladders on the Twitchel, and this is neceſſary, for he may have liberty to repair, and yet not to ſet Ladders; but had it been ſeiſitus of the Houſe it had been ſufficient, but otherwiſe of poſſeſſionatus, unleſs it had been that all occupiers uſe to repair. When a place lieth open its juſtifiable in Treſpaſs to ſet Ladders there, but otherwiſe to hinder the owner of the Soil to build and improve. Adjornatur. (82) Naſans.

Hancock *and* Hodges.

TRover de pare ocreat. & calcar. Angl. Boots and Spurs; which per Curiam is good, ſo of treſpaſs de 2 ovicibus vervicibus & matric. its well enough, though in Replevin it was held ill between Flexon and Robinſon. (83) Trover.

So of a Billiard-Table, and ſticks good, and Judgment affirmed.

Wainright

Wainright *and* Bean.

(84) Utlary. ERror of an Utlary in C. B. after Judgment was assigned, that the Exigent was in figures; but the Court refused to Reverse it, unless it can appear that the party is in Execution on the Judgment in C. B. it being at Election of the Plaintiff there to charge him so or not. Et Adjornatur.

Edgborough *and* Rosingdal.

(85) Gaming. DEbt on Articles of 300 l. on Horse-races, to run four Heats on request for 40 l. a Heat, and again the same day for 100 l. on request, and the Action is only for the 100 l. To which the Defendant demurred on the Statute of Gaming, and Judgment for the Plaintiff, Nisi.

England *and* Clark.

(86) Abatement. ERror of Judgment in Trespass was assigned that one of the Defendants died before the Judgment given; the Defendant in Writ of Error as 4 H. 7. doth surmise before Judgment on the Record, that he died after the day in Bank; after which the Plaintiff surmiseth that he died before the Trial; to which the Defendant in Error demurred: Et per Curiam Judgment affirmed.

Shalcross *and* Bland.

(87) Visne. IN Action upon the Case in Contract made in the Welch Ward of D. in the Vil of Shrewsbury, &c. And this was assigned for Error, but the Court inclined this was well enough, as in London, or of a Street, but de vicineto de White-hall was ill; as Frankners Case this is narrower than the Ward or the Parish, and inferior Jurisdiction: and in B. R. the Writs are De vicineto villæ of Shrewsbury. Sed adjornatur.

against

againſt Scot.

DEbt on Obligation of Nonaginta libris Condition to appear, &c. on Oyer, it was De Novenginta, &c. which the Defendant pleaded in abatement: Et per Curiam there is difference between this Bail Bond, and Co. Osborns Caſe, of another Bond for payment of mony, but being but Record though pleaded only in abatement. Adjornatur. (88) Obligation.

Pool *and* Moſedale.

IN Scire facias on Judgment in eſcape on Oyer, the Defendant pleads that executio non, &c. becauſe after the Judgment, the Defendant aſſigned the Obligation of ſecurity of Toy, the party eſcaped, which the Plaintiff received and accepted; to which the Plaintiff demurred, & per Curiam an accord with ſatisfaction is not pleadable againſt a Judgment, and Judgment for the Plaintiff. (89) Eſcape.

Dominus Rex and

SIR R. Hopkins prayed a Procedendo to order of Seſſions at Warwick, whereby the Defendant, a Parſon there, was charged with Contribution to the poor; and by Hales Chief Juſtice he ought to contribute, and ſo it had been agreed by all the Judges of England in Serjeants-Inn, in the Parſon of Pancras Caſe, and they are alſo contributory to many other Charges notwithſtanding Magna Charta, Cap. quod Eccleſia ſit libera, as to High-ways, &c. (90) Poor.

Keble *and* Pampillon.

EX motione Offly to bring Mony into the Court to ſtay proceedings in debt on Obligation made to the Plaintiff, under whom the Defendant was a ſubleſſee, and on aſſignment by the Plaintiff to the Defendant, the Condition was to pay the Rent formly reſerved during the Plaintiffs reverſionary intereſt, and the Queſtion was whether the Plaintiff ſhould allow Parliament Taxes; & per Curiam this is ſtill payable as a Rent, and muſt allow Taxes; quære if they can diſtrain, if Tenant for life aſſign his Intereſt, ſo, or his Executors on his death. (91) Taxes.

Coſton

Coston *and* Sedgwick. *Thurſday*, November 27.
Trin. 24 *Car.* II. Rot. 347. Ante.

(92) Error.

WInnington agreed the Prorogations are not ad proximam Seſſionem, but at ſuch a day to which the Prorogation is, and ſo he prayed the ſecond Writ of Error, after farther Prorogation to a ſecond day may be no Superſedeas, which Mr. Solicitor Jones oppoſed. Hales Chief Juſtice on conference with Curſitors ſaid that moſt of the Returns, as Sir Chriſtopher Haydons Caſe 2 Cr. 341. is in Inſtanti Parliament, and Raſt. Entr. 320. 'tis Error in Parliament and Regiſter; and in Worſly and Holts Caſe there were two Terms between; but here the next Seſſion is before the next Term, elſe clearly though a Writ of Error may lie, yet its no Superſedeas, nor was Error anciently any Sperſedeas alone, unleſs the Errors were aſſigned and appeared to the Court, and here it was Ejectment by one Tenant in common againſt the other. 2. Of ſo many Acres in certain, and there is no actual Ouſter; but per Curiam this is confeſt by the Iſſue and Trial, & per Curiam were the Error aſſigned to the Court it would be a Superſedeas now, and ſo it is without, and this Writ Teſte the laſt Prorogation returnable the next 7th of January, it was Awarded (nothing being done upon the firſt Writ from the ſitting of the Parliament to that Prorogation) to be a Superſedeas, no Term being between them, and the ſame between Silly and Silly in debt on Obligation.

Clark *and* Naylor.

(93) Prohibition.

PElham prayed a Prohibition to Feverſham Court, ſuggeſting that he offered upon Oath plea that cauſe of Action aroſe out of Juriſdiction, ſed non allocatur, unleſs Affidavit be now made that the plea was tendered on Oath, and ſo was Chadwicks Caſe, of the Penerel, and a Prohibition was denied, but the next day on Affidavit ſhewed it was granted.

Shalcroſs

Shalcrofs *and* Bland. *Friday*, November 28. Ante.

SSR Francis Winnington prayed Judgment, the Affa of the Ward in Yevil being well enough, which the Court agreed on 2 Cr. 222 pl. 1. and notwithstanding Williams urged 1 Cr. 164. pl. 180. to the contrary; Judgment was affirmed. (94) Vide.

LI DE

DE Termino Hilarii

25 & 26 *Car.* II. in *B. R.* Anno 1673.

Friday, January 23.

Hale Ch. J. *Rainsford*
Twisden *Wild.*

Priestman *and* Langly.

(1) Scire Facias.

BIgland prayed a Prohibition on a Libel in Spiritual Court at Lincoln, on presentment for detaining a Selion of Land, which the Court granted, for though they may present a Terrier of the Lands of the Parson or Parish, yet they cannot try the property of the freehold, & Son Frank-tenement being suggested, they cannot proceed there.

Hutchinson *and* Hutchinson. *Saturday.* January 24.

(2) Prohibition.

IN Sc. Fa. against the Testator, the Defendant pleads plene Administravit, to which the Plaintiff demurred specially, because its not said how; and by Hales the plea is ill, and he must shew how he hath payed, because there shall no other Judgment be presumed, unless it be shewed that another is payed off; but the Executor may plead that no Assets came to his hands; but by Twisden and Wild this plea is good enough, as upon a Bond

Bond, and its sufficient on the Evidence to shew payment of debt of as high a nature; but Mr. Solicitor Jones for the Defendant said the opinions had been both ways, and he durst not venture, it being on a special demurrer, and therefore prayed leave to amend, and shew specially how.

Okeover *and* Overby. *Trin.* 25 *Car.* II. Rot. 293.

ERror of a Fine by Mother and by Fem her Daughter, and the Infancy of the Wife was assigned, and here inspected, and on Sc. Fa. against the Defendant, thereon he pleads in nullo est Erratã, and this being to the use of the Infant for life, Remainder to the Mother in Fee, and it being not usual to reply to in nullo est Erratã; but left to the Court, the fine was reversd nisi, and Hales Chief Justice said if Error be well assigned in fact, in nullo est Erratã confesseth it, but if it be matter in fact, and in Law, there must be a demurrer, and in nullo est Erratum is ill, but if the Error in fact be not assignable or not well assigned, there in nullo est Erratum is no confession, as that such a day there was no C. B. sitting, or that in fact he did not appear, these being against Record is not well assigned; and so not confess, and these differences he said he knew ruled in the Exchequer Camber, so it is assigned that the party was not Sheriff, which being on Record, not before us in nullo est Erratum doth not confess it, but this matter in fact being well assigned, the Fine was Reversed. (3) Infant.

Edgbury *and* Rosindal. *Trin.* 25 *Car.* II. Rot. 1233. Ante.

DEbt for 100 l. on Articles of a Horserace, which was to run a Race for 100 l. and three heats for 20 l. a peice on request; to which the Defendant pleads he was requested to run the heats, the Statute 16 Car. 2. cap. 7. §. of Gaming, and that the 100 l. for which the action it brought is part of the 300 l. contracted for, and so void; to which the Plaintiff demurred: And Vaughan for the Defendant, that where one Covenant is void by the Statute all are so: Hub. Norton and Syms and Lee and Smith 3 Co. in Twines Case, and Moor Norton and Smith, so Pl. Com. 68. & Dyer 118. & 10. Co. Beaufages Case, and the Articles in question are (4) Gamer.

to lose on Default of running on request, which on 5 Co. & 2 Car. 507. is intire in contract, as if the condition were to play at three several days an action would lie the first day: 2. The request is but a convenance to the Bar, and so not traversable: and in Debt on the Bond for performance of these Articles, the Bond was adjudged void. Holt for the Plaintiff, that preceeding Articles not are voyd by this Stat. but only such Articles as are made at the time of Gaming actually lost, sed non allocatur, for per Curiam this would elude the whole Act. 2. There is not above 100 l. lost at any one time; sed non allocatur: but as Bond to run three several days, its forfeit on the first loss, and though no more be played or lost, yet the Bond is void, or any other security that is intire, for its looked on according to the first contract and not to the Contingent; whether more or fewer times be played: Also a Bond of 1000 l. to pay all such money as is lost by gaming at such a time, though only one hundred pound be lost, yet this Bond is within the Statute. So where its to game at several days, and the one the Plaintiff wins of the Defendant 100. l. and the other the Defendant wins of the Plaintiff 100 l. this is void, & per Curiam, this is to be taken as strictly as the Statute of Usury which makes contract to pay 6 per Cent, and 6 l. more if I desire it, here though I do not desire the other 6 l. yet the contract is void. And Judgment for the Defendant.

Rod *and* Huans. *Trin.* 25 *Car.* II. Rot. 123.

(5) Sheriffs.

DEbt on Bail-bond on Oyer to appear at Westminster Die Sab. proxim. post Purif. to answer, to which the Defendant pleads 23 H. 6. cap. 10. and that there was a Writ returnable Sabati proxim. post octabis Purif. the Plaintiff replies there was a Writ as the Bond is, and that the Defendant was taken on that Writ; to which the Defendant demurs, and for cause shews its impossible, there being no such day as prox Purif. it not being said Post Festum Purif. nor Cras nor octabis, &c. Sanders for the Plaintiff, that the Writ is not void, for then per dures might be pleaded, and not voided by the Statute, but the Writ is only Erronious, and Octabis is the same day as Proxim. post Purif. Also all the Writs are post Craft. Purif. and not festum. Hales

cited

cited a Reading point in Twisdens Reading, which he had out of Walters Reading, that a lease habendum from the nativity, of our Lord, which was held void, because the Nativity was 1673. year since which was overseen by the arguers, but per Curiam, in this Court dates certain are limited; and though the Feast be named, yet that is not so necessary as Return is good, 23 Jan. though it fall not on the feast day, for the Statute extends not to this Court unless they proceed by original: Craft. must be before Octabis Purif. and is as certain, and unless it be intended the very Purif. that was 1673. its well enough. Pool and Minors Case Return after the Term was held sufficient to justifie the Arrest. So Mills against Sheriff of London, arrest on Writ Retornable on All-Souls was held good, Poph. 205. pl. and by consequence the Sheriff may take Bond for appearance then, but on Smithsby and Lenthalls Case, a Writ Teste out of Term is void, which the Court agreed as to party, but the Sheriff in false imprisonment shall be excused, and so he may here: Also Sab. post. Purif. is all one as Post festum, and must of necessity be in Term. 2. The Plaintiff saith there was a Writ agreeing with the Bond and doth not traverse the Writ alledged by the Defendant, which per Curiam is well enough, being as a new assignment and should be specially assigned for Cause. But 3. the Plaintiffs replication being of Writ Returnable proxim. Purif. 20 Car. 2. its incurable; and the Plaintiff prayed leave to discontinue, which the Court granted or to take a Common apperance.

Osborn *and* Allen.

EX motione Crauly, &c. for restitution in Kent, on an Indictment being out of possession by the bringing of this Action without notice: Hales Chief Justice said that this way of Ejectment was a very dangerous way to strip any out of possession by perjury, and that it were a far better course for the very owner that pretends title to have a form of Declaration: As on 8 H. 6. cap. 9. of forcible Entry, omitting vi & armis, and with Expulit for Disseisivit against the actual possessor, served by the Sheriff with actual notice, which would prevent the struggle for costs and many other inconveniences; and the Court granted Restitution, though the Tenant in possession had notice. (6) Force.

Portef

Porter *and* Bird. *Monday*, January 26.

(7) Damages.

EX motione, Sir William Jones for a new Writ of Enquiry, falſe impriſonment in London five hours, pretending cuſtom of 5 l. an hour, which per Curiam is ill, yet the Damages were 25 l. the Defendant juſtified under the City of London, for a duty called Bill and Crye, a certain ſum on every Tun of theſe, but becauſe this cuſtom to impriſon is void, they let it go by Default: and by Twiſden and Wild the City may in ſome caſes juſtifie the detaining of the goods, but cannot juſtifie the impriſonment by cuſtom, but parties agreed to admit the cuſtom, and take Iſſue on the duty.

Iſted *and* Sawbridge.

(8) Books.

DEbt on 14 Car. 2. cap. 33. of Printing. After Verdit, Cottington excepted in arreſt of Judgment, that the Plaintiff is ſaid proprietor of the Young Clerks Guide by Entry duly made in the Regiſter of the Stationers, which is not ſufficient without ſhewing his title to the Copy, or the ſpecial matter of the Entry. 2. The Defendant is ſaid to ſell 1000. Books Contra formam Statuti, not ſaying it was without licence, which was ſine aſſenſu, and ſo miſtaken. 3. The Informer ought to have no Coſts; but this may be releaſt before Error brought: Alſo the Court concluded the Entry ſufficiently purſuant the Statute, and there needs no other title. And Judgment for the Plaintiff.

Turner *and* Vanſdal.

(9) Prohibition.

SErjeant Hards prayed a Prohibition for the Adminiſtrator in Canterbury peculier, in ſuit by the Defendant in Prerogative, ſuppoſing a Will & bona notabila, which the Plaintiff ſaid were none, ſed non allocatur, for per Curiam, if there be no bona notabila, the Adminiſtration in the Prerogative is void, 3 Cr. (457) pl. and the firſt Adminſtration ſtands, and the Prohibition was denyed.

Simons

Symons *and* Willowby. *Trin.* 25 *Car.* II. Rot. 322.

IN Indebitatus pro diverſis mercimoniis and a Quantum meruit, the Defendant pleaded non-aſſumpſit to the indebitatus, and tender as to the reſt; the Plaintiff replies that before the action here, there was a plaint in London in Indebitat. pro diverſis denariorum ſummis, not ſaid prius accommodatis and a Quantum meriut, varying in ſum, but averrs quæ eſt eadem, and that no tender was before the firſt payment; to which the Defendant demurred, & per Curiam, the tender muſt be before the firſt payment, and the Averment quæ eſt eadem may very well be, and ſo upon the Statute of limitation, Benin and Clapham in Exchequer, Car. 2. & it was adjudged, and being not ſaid prius accommodat' the variance in ſum is not material, but ſupplied by this Averment. And Judgment for the Plaintiff, becauſe any evidence but of obligation is admittable thereon, &c. (10) Aſſumpſit.

Blackborn *and* Greves, Modern. 102. pl. 8. *Wedneſday*, Jan. 28.

SPecial Verdit find the Lands Copyhold, ſurrendered by J. S. to the uſe of A. for years; the Remainder to B. and his Heirs, B. dies, and whether his Heir ſhould pay a fine was doubtful, on a ſpecial concluſion that if admittance of leſſee be admittance of him in Remainder, then for the Defendant. Hales Ch. Juſt. Baker and Denhams Caſe, Stiles 145. pl. 327. if any Copyholder die ſeiſed, his Land ſhould go to the youngeſt & Ceſtuy queuſe dyeth before admittance, and whether this ſhould go as at Common-law or by cuſtom was the queſtion? And adjudged it went according to cuſtom. And this is an admittance of him in Remainder to all intents and purpoſes; except as to the Lords fine, which if by cuſtom is paiable by the Tenant for years for himſelf only; his admittance avails not him in Remainder, Contra if the fine be paid by the Leſſee for all Eſtates: Alſo this 2. is Trover by one Tenant in Common; which on not guilty is void againſt the other, and muſt be pleaded in abatement: but in Trover by one Tenant in Common againſt a ſtranger he may recover his part, Contra in Detinue, which recovers the thing intirely. Sed adjornatur. (11) Copyhold.

Holmes

Holmes *and* Taylor.

(12) Joynder.

ERror of Judgment in Northampton, in Assumpsit and Trover joyned on Verdit for the Defendant in Trover for the Plaintiff in Assumpsit. Hales Ch. Just. I held it ill in the Fabrique and not like 2 Cr. 655. where Bar. and Feme, joyn in slander 1 Cr. 515. 18 Ed. 4. for words of Bar. and Fem. there Verdict on not Guilty for the Defendant, as to the words of Bar. and Feme, in which the Feme cannot joyn, is well enough, yet in both cases there are several Judgments, which differnce the Court agreed. Sed adjornatur.

Hawkins *and* Hawkins. *Thursday*, January 29.

(13) Accord.

IN Assumpsit to Wainscot a Room as well as any in that Town, and avers J. S. in that Town had one so Wainscoted; and although he was requested such a day at D. he had not done it; the Defendant pleads that in consideration of 10 l. paied and promised to do another the Plaintiff exoneravit the Defendant; to which the Plaintiff demurred, & per Curiam, as an accord, a consideration of giving promise is sufficient execution, Contra of a promise to pay, that must be paid. 2. The request must be, else the Defendant hath during life: and though there wanted a place of actual request, yet this is passed over by pleading quod exoneravit, or taking Issue on other matter, whether it be on Verdit or demurrer. Also the Bar. 3. was quod exoneravit, being said half a year after, and not saying it was before breach, its ill by Paroll, if it were after the breach, and therefore being incertain its ill, but the parties agreed to submit to Justice Wilds Arbitrement. De Alto & Basso.

Thomas *and* Sorrel. *Saturday*, Jan. 31.

(14) Wine.

VAughan Chief Justice of C. B. for the Defendant. 1. That the Patent 9 Jac. is not void in the Creation, and so remains yet a good Patent still, and though the Successor have power to dispence, eodem Genere, yet not eodem particulari, as the Predecessor did for being once exempted by the present King, he cannot be exempted by the Successor, as on alienation of Crown-Lands, or pardon the Successor may alien or pardon other things, but not the same that was alienedd

alienéd and pardoned. Also 2. supposing the Patent good, the proviso in 12 Car. 2. cap. 25. doth support it as a lawful usage in the time of Ed. 6. and that this Patent is good in its Creation is clear, though this were a Law pro bono publico, and to a Corporation, and no steady Rule hath been observed except 11 H. 7. 11. & 12. of dispensations: for that rule of Mala prohibita & in se, hath more confounded mens Judgments than enlightened them. 1. Every act a man is enabled to do is equally good as any other act, actus qua actus non est malus, but good or bad, as Prohibited by Law, without which thereis no transgression, therefore it follows that every malum is Prohibited by Law. 2. Dispensation utilitate pensata, is Ignotum per Ignotius & liberatio a pœna is the effect of a pardon, but a dispensation doth jus Dare in things thereby made legal and allowable; the King may dispense with malum prohibitum, a Bastard to receive orders, or a Clerk to have two Benefices; the one against the Canon, the other against the Council of Lateran particularly: Also mala in se is not generally dispensable, but non Constat here what is mala in se, nor is this true in all instances, but to difference such as are dispensable from what are not; Murder, Adultery, Sacriledge are Prohibited by the Statute, yet not dispensable, but the sum is that the thing be Prohibited, and its not sufficient that these were Prohibited at Common-law; for Murder, Stealing, Perjury, Trespass, &c. signifie unlawful acts, and therefore if these might be dispensed with, this would make unlawful killing lawful; and unlawful entries and other acts lawful: so the same thing at the same time would be lawful and unlawful; and so would be void in it self, it being impossible to obey contradictions, and which a man cannot obey; therefore mala in se are such acts as can never be made lawful. As the King cannot give power to kill or to do a Nusans, nor licence any to imprison another; a dispensation to take away from a man what he may lawfully defend, is void in life liberty or estate; but killing a man doth not import unlawful killing. Every new capital punishment, and new aid makes that lawful, which was not before, which only transfers the property men had before in toto or in tanto, as where the Wife of A. is made the Wife of B. this is no adultry in B. Bract. 132. quod alienum est non potest Rex dare per Gratiam suam, without their assent by Patent or act of Parliament in which its included. And thus the Lord may transfer the property of his Villain, Grot. 1. cap. 1. Sect. 10. pag. 195. sicut ergo ut bis duo non sunt quatuor, so God cannot make

what is intrinsick evil good, as Murder or Theft, another malum in se, what the Law of the Land admits to be specially prohibited, Jure Divino, as licence to fornicate cannot be by the King, Bishop or Presbiter: Sodomy or Marriage within the Levitical degrees, mala in se imply a contradiction to be made lawful, but what may be lawful or not at the pleasure of the law-maker is not malum in se, 3 Inst. 237. though 3 Ed. 2 action upon the Statute 26. on 31 Ed. 1. de pistoribus, a Corporation cannot sue for a publick Nusans, unless it hath particular injury; Co. Lit. 56. 27 H. 8. 26. nor can the King dispence with Common Nusance, which are no other offences at Common-law than these are now, but they were made offences as these are now; and Nusances specifick may be made lawful, therefore are not mala in se, but a Law to commit a Nusance is void: but by a Law a Baker or Attler may sell in any weight. Corn may be bought up going to Market; or a publick water-course may be turned, which were only publick evils as Prohibited, yet to break the assie of Bread, Ale, &c. cannot be dispensed with because this would take away mens particular actions for injuries. Some offences against penal Laws may be dispenced with, as where the Subject can have no particular Damages, and so no particular action for the transgression, as if transportation of Horses, Corn, Bellmettle be prohibited, no Subject can sue, for if any, every man might sue, but such offences are against the Kings publick person which he may dispence with being pro bono publico, but not pro bono omnium particularium populi, as the Laws of a family they are complicate for the good of all; other offences, the King cannot dispence where the transgression of the Law is to the injury of particular persons, as maintenance, forcible Entry or Driving distresses out of the County, which are no mala in se, yet the King cannot dispence with them, though only mala prohibita; no non obstante can dispence with these or the like Cases, as 8 H. 6. 19. The Chancellor of Oxons Case, the King cannot licence Baker or Taverner to break the Assize, nor the Butcher to sell measled meat; nor licence Labourers to take more wages, or fees than the Law allows, or to take beasts of Plough: which takes away mens actions for particular injuries done to third persons, but where none can have particular injury the King may dispence a popular action when begun: Also 12 Car. 2. 25. hath particular instances of all these: As 1. The selling Wine without licence wrongs none but the King, therefore he may dispence with that; but of ill mixtures or rasing prises, those are

are injuries to the Subject with which the King cannot dispence; so Officers to import Corn Contra, 3 Ed. 4. cap. 3. is void notwithstanding any non obstante, for this would bring in Monopolies and prejudice particular Merchants, and there is no other difference in Penal Laws; for greatness of punishment makes no Gradation, all being equally necessary, the greater or less capital doth not take away the Kings dispensation where none receive injury. 5 Ed. 4. cap. 4. in 3 Inst. 74. cap. 20. As to the second question of dispensing to Corporation the nature of the offence being dispensable, the King is not confined to number or place, and its admitted a Corporation is capable of a dispensation, where the King hath an inheritance as in Customs, and if these be so, the Kings not knowing the persons or number will not make the dispensation void: for this would make it void in all Cases. Zuares lib. 6. cap. 12. Fol. 416. De legibus dispensatio per se. 1. Versari potest circa privatum potest etiam versari circa Communitatem, which is as a privilege or exception from a general Law; and thus the Pope from whom these are derived, as Laertius Cherubimus of his Bulls to Corporations more frequent than to particulars 1 H. 7. 23. doubts only on later Laws in H. 6. time, but its apparent the King may licence Corporations, and their Successors to dam up the current of the Sea. Register 254. ad quod Damnum of the Prior and Covent of Case; and the like to the Friers Minors, in all which Cases not only the Body Politick, but every particular member had use of it more than the Body Politick, so to set out a new way, in all which Cases the King hath no Inheritance. So to be exempted from Toll, which is only to be from what he should do as a dispensation is to do what they should not. And 4 H. 6. & 21. Ed. 4. 16. of Norwich to be exempted from Judges, and the forfeitures on Penal Laws are more the Kings Inheritance or interest than exemptions, Com. 487. and if 7 Ed. 6. & 12. Car. 2. had been to pay 2 d. by every man that sells without a licence, this had been a duty of inheritance to the King; so to pay 5 l. on sale contrary to the Statute, every man were free to sell paying 5 l. and this had as much prohibited the selling, as now penned. 2. To Corporations licence of Mortmain, to make a Park, to convert Arable to Pasture; which was offence at Common-law, and so proceeded against in the Star. Chamber after Jac. cap. that repealed the former Laws. Also licences to convert Woods, to erect Fairs or Markets, to appropriate a Rectory, and in the Rolls 6 H. 8. pars 1. Licence to the Corrisers, against 1 Rich 3. cap. 9. & 1 Ed. 6. pars 1 to the

Inhabitants of Norfolk and Norwich to bargain for Wooll against 37 H. 8. cap. 15. of regrating of Woolls for a year 2 Ed. Pars 3. to the Merchants of Venice to buy 500 Sacks of Wooll, and work them, and transport them, against 4 H. 7. cap. 11. & 7 Ed. 6. Pars 6. to the Merchants that pass beyond the Sea to carry Mony against 2 H. 6. Cap. 6. viz. 4 l. a piece, and 2 R. 3. pars 1. a Proclamation against 1 Rich. 3 Cap. 8. of making Cloth 27 Eliz. pars 3. license to the Commons of Great Yarmouth and their successors to transport so much Wool 26 Eliz. pars 7. the President and Merchants of Spain and Portugal to transport Leather, and 3 Mariæ pars 2. to Merchants of the Sullyard to carry Cloth unbarb'd against 21 H. 6. 16. & 33 H. 8. Cap. 9. and to the Merchant adventurers 1 Mar. pars 1. to transport against 3 H. 7. 11. Cloth and to do it in strange Ships, 5 Car. 1. according to the Merchants of the East-Indies to transport 10000 l. in Gold to the Indies reciting license of King James and King Charles I. to transport greater sums, and many more in the Tower, and that these cannot be done without the Kings License is not material, for this is only to such as are capable of License; Judgment ought to be for the Defendant. This is the Kings dispensation not the Corporations, as making Justices Comis. Br. 5. and where the persons are disabled they are as dead, so no dispensation good, not to take Oath of Allegiance with Symony or buying Offices, and they that argue against the Defendant argue against the Kings Prerogative, which is his power to do what he will, and will what he can do. Hales Chief Justice for the Defendant, the Information is die lunæ cras Ascentionis, and nil debet pleaded, which is sufficient for this special Verdict, notwithstanding 21 Jac. Cap. and the difference always was that the proviso in the same Statute may be given in evidence, as here it is; but if it were in another Statute it must be pleaded. 2. The 22. of May being three days before Craft. Ascent. though the time of selling be not determined, its well enough as to the main. 1. That this license is good as previous, to which are considerable: 1. The Terms in relations to Acts of Parliament, their Repeal, Dispensation and License to do things, otherwise its certain an Act cannot be repealed, abrogated nor suspended, but by Act of Parliament 15 Ed. 3. Cap. provision was against prejudices to the King and people, 1 Oct. 15. Ed. 3. a Proclamation Issued to repeal it, which did not obtain, till 17 Ed. 3. Numb. 23. a special Act of Parliament was made to do it, and therefore 26 H. 8. Cap. 10. of repeal of Acts for exportation was specially to enable the King to repeal by Pro-

Proclamation. 2. As to dispensation which neither takes away nor suspends the Law, but the penalty which is limited to the King, such as immediately concern the Kings interest and the subject, but consequentially the King may dispence with, as 28 H. 6. Cap. 8. of Sheriffs 22 Ed. 3. in perpetuity 43 Ed. 3. Cap. 5. as 2 H. 7. so 12 Co. 8. and on 31 H. 6. Cap. 5. of Customs which the King grants every day for life, yet the subject had consequential advantages, but at this day there is no Sheriff in fee; but Westmorland is ancient. 2. Such as immediately concern the subject or any particular, as 13 Rich. 2. Cap. and 2 H. 4. they cannot be dispensed with: This power, though it be a Prerogative, its under certain Bonds, and regularly were there no more than that the Case stood hereon, the Defendant would have a hard Case, but this is a different Penal-Law from the rest against 3 Ed. 4. Cap. of not importing Goods Prohibited, no dispensation can be in perpetuity, and grant to the Corporation of London to import, otherwise would be void, and a repeal of the Law; also upon 11 Co. of Monopolies, a general liberty to import Foreign Goods for life is void, as Noy on the grant of Cards to Darcy, which depends not so much on the sole Importation as upon the being without stint, else there may be a grant to all the Men of Norfolk to be Free from the Penal Laws as to the Corporations here, did it depend on Prerogative barely, 7 Co. 64. of limiting the penalty to others, and 14 Car. 2. Cap. and 18 Car. 2. Cap. of Importation of Irish Cattle making it a nusance, and as of ancient time 27 Ed. 3. Cap. 7. of the Staple by making all Licenses and Dispensations against that Statute void, and 34. Ed. 3. Cap. 21. Licenses to transport was held not sufficient without a particular Act of Parliament. So 26 H. 6. Cap. 2. Licenses to export was revived by another Act. 3. The word License agrees in name with Dispensation, as used promiscuous, and both refer to the Statute against which its granted, but that is a License that by the same Statute that Prohibits the sale, saves to the King, and excepts out of the penalty such as he licenseth, as 9 Ed. 3. Cap. 1. & 5 R. 2. Cap. 4. of exporting Coin, and 1 and 2 Philip and Mary Cap. 5. of Corn 1 Ed. 6. Cap. 5. of Horses. 2. When the Law it self in its nature and kind is introduced for the Kings advantage, as 1 Eliz. of unlading at such a Key, here the King may license. 3. When one Prohibits, and a subsequent Act gives the King a power to license, this is a Parliamentary concession. So 7 Ed. 1. de Religiosis, and 28 Ed. 3. pro clero, though without this Act

Licenses

Licenses might be, so 27 Ed. 3. of the Staple are peremptory, yet other Acts license to carry elsewhere. 2. As to the particular matters of this Statute 7 Ed. 6. Cap. 5. which sets price and quantity to be kept in House, &c. and the dispensation is in the Town of Stepny, neither Market nor Corporation, so not prohibited by 7 Ed. 6. and at Common Law any might sell, and the King hath neither power to license nor restrain, and he may license where Justices cannot, and where they may by concurrent power, and his license prevents the Justices also for longer time than from Session to Session, as Youngs Case for two lives, agreed by Dier 270. but yet if these Taverns prove common nusances they are punishable, as at Common Law for disorder or ill places, or too many; and its not the question whether a license may be in this Case, for its agreed the King is not excluded to license, but whether he may license in this manner is the question. 3. That a license may be to a Corporation is plain for a time, as to Merchants to transport so many Hides of Leather: and in all times such licenses have been to Corporations: for particular purposes a license to Vintners to keep a Tavern for life of J. S. is good, but did this depend only on Prerogative, it would be hard, and 2 R. 3. 11. and 1 H. 7. 2. comes not to this purpose, the Ordinances of Staple were by Grand Counsel, not by Parliament, till 28 Ed. 3. Numb. 16. setling the Staple for Ireland, and ordained no Staple at Callis, till 1 March 37 Ed 3. by Ordinance of King and Counsel, not by Statute, as 43. Ed. 3. Cap. 1. recites, and 24 Feb. 38. Ed. 3. the Grant was made to Waterford, which dispenced not with any Statute, there being no Statute then made, so of no weight, but when confirmed by 2 H. 6. Cap. 4. 14. H. 6. Cap. 2. &c. there was provision by all the subsequent Statutes, that the King might grant licenses. The first Staple settlement by Parliament was at Callis by 15 Oct. 50 Ed. 3. Numb. 209. but the reasons that induce me to hold this a good license, are because this power hath the countenance of an Act of Parliament since 7 Ed. 6. so hath greater force than a bare Prerogative power, as by 5. Eliz. Cap. 5. the scope of which was to let Vintners lose in retail of Wine though not by direct enacting, but as in the Statute of 8 Eliz. Cap. 5. also 21 Jac. Cap. of Informers, which is not to extend to such as retail Wines, or compounding for Wine Licenses, so as the benefit do extend to the King, this gives great countenance to these licenses, though the chief design were to preserve Williamsons and Lord Gorings Patent of licenses. 2. There is a great evidence of fact by 100 years constant

constant enjoyment, from 29 Eliz. & 9 Jac. and the resolutions 2 Jac. which could not pass sub silentio when the main matter was started, but 43 Eliz. a little before; also these licenses have been for two and three lives. Youngs case was so in Grays-Inn, where Justices also have power: As to Sir Walter Rawleighs Case, Co. Entr. 370. that was a license in gross and grant, that whom J. S. name shall sell, is void: So grant 20 H. 7. Rast. Entr. 382. that whomsoever the Abbot of St. Albons name be a Justice, is void, being not executed, but this is as exemption to Corporations from Juries, or licenses to J. S. and such as he names to transport 100 Calf-skins, admitting it well executed in the first Man, the later comes in as an assignee.: So upon the Statute 1 & 2 Philip and Mary Cap. 5. and Youngs Case, and 12 Car. 2. Cap. 25. were there not a Prohibition not to assign, he might. 2. As to the consequence hereof, that hereby Counties may be exempt from penal Laws, Were not the Vintners better supported than other penal Laws, it were not maintable; but this is of a different dispensation from all others. 3. This doth not determin by the Kings death, being not a bare authority but a privilege, as to imparke, to alien in mortmain; also its a power assignable, were there not a proviso in 12 Car. 2. to the contrary, as 2 Jac. Shaw and Haws license to transport Sheep-skins Hill. 3. Jac. Rot. 128. adjudged good by way of nomination, though not so properly by way of assignment; also this ties up the hands of the successor no more than Fairs or exemption from Juries, which is always within a Precinct when persons are substitute within their Jurisdiction, over whom they may hold plea, as to Norwich. 4. This dispensation though it relate to 7 Ed. 6. is available on this Statute 12 Car. 2. which designs to Incorporate the Vintners into the benefit of this Act, as if they had been excepted, as the Universities and St. Albons, whose Patents are to stand, only as to this Act, yet hereby they are Incorporated from 7 Ed. 6. to this Statute, and this is but to London and three Miles elsewhere; the King is not restrained as they are; and in Stepny the Justices cannot license, so its not within that Case; therefore Judgment for the Defendant.

Marshal

Marſhal *and* Boucher. *Tueſday*, February 3.

(15) Lieu. LEvins prayed a Prohibition to the Court of Durham in Action of Covenant on plea to the Jurisdiction, that the Indenture was made in Yorkſhire, and ſo not triable there, ſhewing an Affidavit of ſwearing tender and refuſal of the plea, ſed non allocatur, for if breach be in not repairing the Houſe in Durham, its local, and till Count it cannot appear. But Levins urged that this plea is to the Jurisdiction, and ſo muſt be before Count, and they intend to plead non eſt factum; but by Rainsford and Wild, the reſt abſent, this cannot be pleaded after ſuch an Affidavit confeſſing the Indenture made in Yorkſhire, and this plea cannot be, if any Indenture, &c. as on Affidavit to change the venue, and Prohibition was denied.

Dominus Rex and Fox. *Thurſday*, February 5.

(16) Place. STroud excepted to a Return of Habeas Corpus on Commitment by Juſtices in Seſſions for not taking the Oath of Allegiance, becauſe by 3 Jac. Cap. 4. the tender is to be by the Biſhop, or two Juſtices, and again in Seſſion, ſed non allocatur, for per Curiam this is but in order to a conviction; but as to a Commitment the Juſtices may do it in Seſſions, and this ſufficeth in order to Conviction the next Seſſion after: ſo on 7 Jac. Cap. and he was remanded.

Bale *and* Bale.

(17) Amendment. IN Ejectment of the Rectory of Humberſton, and other Tenements virtute cujus intravit in tenementa prædicta, after Verdict and Judgment, de Rectoria & tenementis prædict. Bigland prayed an amendment of the Declaration, ſed non allocatur, for this might attaint the Jury; but on ſuch omiſſion in Judgment or Acts of Court it were amendable, but not of the Declaration, but the Court conceived it well enough, and that the word Tenements includes Rectory whether there be Glebe or not, and not ſo of a Manor, &c.

Baker

Baker *and* Betesford. *Saturday*, February 7.

IN debt on Obligation, Conditioned to releale to the satisfaction of the Defendants Counsel in seven days after recovery against Roll and Baker of any sum on account in Chancery, who Decreed an Arbitrement made by Merchants; to which the Defendant on Oyer demurred, and who should tender the Releale was the question, the bar being that Roll had paid his part Awarded, and that yet the Plaintiff had not tendered a Releale of that moiety to the Defendant to Seal; to which the Plaintiff demurred. Et per Curiam, where the Counsel is to advise, the Defendant must contrive a Releale; but where it is to be to the satisfaction of the Counsel, it must be first tendered before Counsel can Judg upon it; and though it be only to seal and execute, yet this implies the preparation of making, &c. Judgment for the Plaintiff. Nisi. Simile Condition. Br. 1. (12) Tender.

Dominus Rex and Baker. Ante.

STroud prayed Judgment on Information on 22 Car. 2. Cap. 12. against Carrier because as on 3 Car. 1. Cap. 3. where particular penalty is so 15 R. 2, Cap. 5. on forcible entry this Court is not bound by general words, unless expressly excluded: and Castles Case, 2 Cr. 644. was by Indictment, and the constant course on 1 Jac. Cap. 9. and on 21 Jac. against Drunkards, this Court constantly proceeded; but Hale Chief Justice held this an illusion of the Statute, but for what arises within the County where the Kings-Bench is, an Information may be here, and its the worse because no Information is specially appointed to be taken by the Statute, and on 5 Ed. 6. Cap. of selling Wine it cannot be out of the County, and 22 Cr. 1. a difference was taken where one Clause was prohibitory and another affirmative, the Suit may be here on the Prohibition, but on Ed. 6. here an Information was preferred by Buxton and Sheerlock which by Wild Justice was on Certiorari, and so any may be removed. Sed Adjornatur. (13) Information.

Glene *and* Glens.

(19) Rent. DEbt by the Executors for arrears of Rent due in the Testators life-time, after Verdict and Judgment in C. B. Error was assigned generally, being against the Tertenant on grant of Rent-Charge, and Judgment affirmed.

Benson *against* Hudson.

(20) Tail. ERror of a Judgment in Lancaster in Avowry for Rent-charge, granted by Mosely for Portion of a Daughter, to be paid on failer of Issue Male at such a time, and on other contingents; in bar of which the Plaintiff in the Replevin pleaded a recovery by the Issue Male of Sir Edward M. before he died without Issue Male; to which the Avowant replies, That before the recovery he made a Lease for 1000 Years, which is yet in being; to which the Plaintiff demurred. And whether this Fine and Recovery by the Issue intail bar this Rent granted out of the Reversion, or not, was the question. Et adjornatur.

Mack-Chartes's *Case*.

(21) Payment. IN Covenant to pay 80 l. quarterly: viz. at four such days during the Term for Wages, which was excepted for Error by Mr. Solicitor on Judgment in Ireland, because if this viz. be void, the payment quarterly hath no certain time. 2. The Nisi prius is ad diem & locum, and not said ad Horam infra contentam, as there the Writ is at such an Hour in the Afternoon, but being in Term-time its well enough, because the Courts Superior sit in the Morning. So Nisi prius here is intended when this Court is risen, though no Hour be mentioned, especially when both parties attended, and hereby being only a transcript, Judgment affirmed. Nisi. 227 pl. 26.

Warn

Warn *and* Prideux *and* Barton. Ante.

IN Replevin of taking away the Sails of a Ship, Barton pleaded non cepit and Issue thereon: The Defendant Prideux avows as seised of the Mannor of D. for that between Wade Bridge and Stipper point, there is a Key Common time out of mind Infra Manerium, which he is bound and hath used to repair; and at his costs hath kept a common Bushel for measuring Salt and other measurage, and by reason thereof have Bushellage for a Ship loaden between the Bridge and Point, that did not unlade, and prescribes to destrain reasonable apparel; the Plaintiff replies that the River of D. is of larger extent than the Mannor and Key, and traverseth the Ships coming into the Key, not saying it did not come within the Mannor; to which the Defendant demurs. And Polixphen for the Defendant, that the prescription for the Toll on 21 H. 7. 16. the Mayor and Commonalty of Glocestors Case is a good prescription, Br. 92. without cause shewed 3 Cr. 710. & Dyer 352, as of Cranage to London; and its doubtful wether it may not be prescribed for a thorough toll, but in the cause at Bar there is reparation, and common Bushell which are benefits to the stranger: also had this been of such as unload at the Key it had been good, and refusal to use it is not sufficient against it, 2 Inst. 222. for it reacheth to all being of Common benefit, 2 Roll. 265. Dublin prescribed, and though particular persons will not use this benefit they shall pay for Crainage of Weights and Beams 1 Leonard 231. its not necessary to aver any actual use of it, and that this was out of the Mannor is no objection, for yet as 7 Co. 16. & 5 Co. one Lord may prescribe to use in anothers Mannor such a liberty. 2. This distress as for murage, which as Welch and Bell Pasch. 21 Car. 2. of the Cart or Horse driving it: And 1 Roll. 666. if there be no other distress is good; and most Tolls do stop the Boat that is to pay. Courtney for the Plaintiff, that this prescription is void, being without meritorious consideration; and the reparation is confined only to Ships coming within the Mannor: and the Bushellage as 14 H. 4. 14. is sufficient alone, and Dublin kept stakes for guidance of Ships, which is a publick benefit: Also all Ships may come to the Key, but they are not bound by this reparation unless they come within the Mannor, Dyer 117. pl. Also the Ship is only said to come within the part which is free for all, and not within the Key. 2. The offence if any is by the Merchant, and the distress is taken

(22) Admiral.

on the Mariner who is a ſtranger; and in ſuch a Caſe his Cattle unleſs Levant and Couchant cannot be taken. 3. The Sails are no reaſonable part of the apparel, being not only exceſſive in quantity, but unreaſonable in quality: as the Horſe of a Traveller, and utenſels of Trade, and in Admiralty they ſtop the whole Ship by taking the Sails. Hales Chief Juſtice ſaid this is no preſcription for a Port then, as in Yarmouth, Newcaſtle and Glouceſter, for the Severn ſuch a duty might be, but this is only for a Wharf, and therefore it ſhould be averred he came to it. Alſo a Toll on Sea muſt ſhew cauſe, that being freer for Trade than the Land: Alſo whether a Ship partly laden with Salt may be ſaid to be laden with Salt ſo as to pay, & per Curiam, this is unreaſonable, being out of the Mannor. In C. B. Twiſden ſaid in St. Johns time preſcription to keep in Port Buſhells to meaſure, &c. and on averment that the Defendant ſold, it was debated, becauſe it was not ſaid that the preſcription was to take of ſuch as ſold, and held well, being for a Port; ſo in Whitby, Waymouth, &c. where they are bound to maintain conveniencies of Harbage of Weights, Meaſures, Anchorage, &c. which is publick benefit, Keyage and Wharfage within a Port may be granted as well as preſcribed: And in the Bellman of Litchfields Caſe the preſcription is for a Quart out of every Buſhell holding ſo much. And laſt Aſſizes Wild ſaid before him it was in queſtion if Whitby were a member of New-Caſtle and found it was; yet they may be diſtinct Ports as to ſuch preſcriptions: and the Court inclined ſtrongly againſt the Avowant, that this muſt be Infra manerium, and the diſtreſs is unreaſonable. And Judgment for the Plaintiff, niſi; being but a Wharf its malum Tolnetum, unleſs a Ship come in.

Taylor *and* Holmes. *Munday*, February 9. Ante.

(23) Joynder.

ERror of Trover and action upon the Caſe joyned, and Verdict for the Defendant as to the Trover, and for the Plaintiff in the other, on 3 H. 4. 13. Debt and Account and Joynder, Br. 97. & Contra 7 H. 7. Regiſter & 3 Cr. 20. Treſpaſs and Debt is not joynable, one being on a wrong, the other on a duty, though the Judgment be miſericordia in both Wild. Juſtice ſaid that in Guildhall where evidence is given only in the action upon the Caſe, and verdict for the Defendant: In the other its well enough, being

being a Bar in any other action, but the Court inclined contrary. Sed adjornatur.

Lomax *and* Armorer. *Trin.* 25 *Car.* II. Rot. 434.

IN Dower by plaint in New-Caſtle; on Britton 108. F.N.B. 47. B. Levins aſſigned for Error, that it ought to be by Writ; 2 Inſt. 3. 11. & 3 Cr. 101. a cuſtom to hold plea ſo is void, and ſo of Detinue in Huſtings. Co. Entr. 129. And as to the Caſes of Fines, 44 Ed. 3. 28. & 37. in 50 Aſſ. 9. in baſe Courts is different from this being amicable and as a Feoffment, yet 3 Cr. 314. is contra, and 3 Cr. 116. Owen 93. preſcription to levy Fines is void below. Hales Chief Juſtice ſaid an Aſſize of freſh force lieth by Bill, and Fines in ancient Demſn have been, but as at Common-Law, they cannot be in inferior Courts, for this Writ of Covenant is in nature of a real action: Alſo where there is a cuſtom there is a Writ of right, proteſtando to proſecute in the nature of any Writ. Adjornatur. (24) Dower.

Bohun *and* Springat.

IN a Writ of right Proteſtando in Monmuth, to ſue in the nature of an Aſſize, virtute literarum patentium, and do not ſhew how. 2. The Proteſtando is by cuſtom which is void, the Court being virtute literarum patentium, and this proceeding by Proteſtando cannot be without cuſtom, therefore it ſhould be virtute literarum patentium nec non ſecundum conſuetudinem, but if the Patent only confirmed the cuſtom, the averment ſecundum conſuetudinem is ſufficient and Judgment reverſed Niſi. 3. The Impariaus is by dies datus eſt to the Defendant, and not partibus prædict. nor an idem dies to the Plaintiff. 4. The Aſſize is not taken in right of Damages, all which are ill. (25) Wales.

Mack-Carte. Ante. 274 pl. 21.

THe reſervation of the 83 l. viz. Quaternatim, and the breach is aſſigned for non-payment of 40 l. viz. ſo much Quaternatim; & per Curiam, without the per equales partitiones, and the viz. is to expound the days, and though it differ in the ſums its not material; and Quarterly muſt be intended (26) Payment.

intended by equal portions, loquendum ut vulgus, as Rent of 80 l. reserved Quarterly, viz. 20 l. at five several days. Sir William Jones waved this exception, and relied upon the latter exception of the day of Nisiprius, in regard its Postea the same day, and it cannot be till afternoon, and the Court will not intend it was at any other hour: and Judgment affirmed Nisi, all parties appearing.

Domius Rex and Baylow *and* Norman.

(27) Treason. JUdgment against them for Clipping was given, only to be Drawn and Hanged as the safer; being a Treason of an inferiour nature, and the same with Coyning: And thus of later times the Judgment hath been on Dyer, but hath been a doubtful opinion, and may be either way. And Twisden on 3 Inst. said he had at York given Judgment to hang Draw and Quarter, supposing it a new Treason on 5 Eliz. cap. 11. & 18 Eliz. cap. 1. the others supposed 3 H. 5. cap. 6. Stat. 2. that declares Clipping Treason, within 25 Ed. 3. cap. which continued notwithstanding the later Statute that recites it 1. & 2. Pasch. & Mar. cap. 11. and where the principal offence of Coyning is but to be Drawn and Hanged, a new Law of less import shall not have a greater Judgment than the principal, and this Judgment was pronounced by Twisden, the second Judge saving, the right of the Chief Justice who was said ought to do it, and on conference with all the Judges of England.

Waymond *against* Aboab. *Tuesday.* February 10.

(28) Nosme. IN Debt against Jacobum Abboab the Defendant pleads & prædictus Abboab is called by the name of Jacob and not James in abatement; to which the Plaintiff, on 2 Roll. 137. demurred, and the Court inclined it was well enough. Sed adjornatur.

Sparrow *and* Neal. *Thursday,* February 12.

(29) Ways. IN action upon the Case against a Common Carrier, Paulet in arrest of Judgment excepted that its neither by way of Assumpsit nor for any Tort, but in consideration the Plaintiff bargained with the Defendant to carry the goods

of

of one Cumberford, who recovered againſt the Plaintiff who could not carry them, but imployed Neal the Defendant, who opened the Trunk and took out ſome goods recovered againſt the Plaintiff, and the Plaintiff would have offered the Evidence of recovery by Cumberford againſt the Plaintiff Sparrow. But Hales Chief Juſtice denyed that, but the now Defendant having taken away ſome goods, the Jury being the ſame gave as full Damages as to the value as in the former Action; which the Court held well enough: And though no execution be averred by payment on the Bargain, its well enough. Alſo he that firſt ſets up to be a Carrier, is as liable as any. 2. Its not averred the Plaintiff was liable to Cumberfords action, ſed non allocatur, for he hath his remedy againſt the Hundred, as every Carrier hath. And Judgment on Verdict at Guildhall yeſterday for the Plaintiff.

Dominus Rex againſt Pell *and* Offly.

ON Habeas Corpus directed to the Chancellor of Durham, that he make a Precept to the Sheriff to have the body before us at Weſtminſter: The return is that the Chancellor iſſued a Precept to the, Sheriff to return his body before him, and that the Sheriff returned, paratum habet, and its not ſaid that the Chancellor hath them here: which per Curiam is ill, and a variance, and it ſhould be Cujus Corpus paratum Habeo in this Court, for a Habeas Corpus ad ſubjiciend' is always intended to him that hath the body, though ad faciend' may be circular as this is, and by Wild in C. B. one of ſeven was remanded for want of paratum habeo in Cheſter, and the other ſix were diſcharged on Habeas Corpus on a like Excommengment for Conventicles. 2. It was excepted that its not ſaid the Defendants were inhabitants within the Diocels: as Moor 407. pl. Beuamouds Caſe, which per Curiam is amendable at leaſt. 3. It was excepted that here is no ſufficient title to a County-Palatine, but per Curiam, the Writ is an Eſtopple to this, and if it be none the Writ is void; & per Curiam, the Writ being ill they were neither remanded nor retained here, yet per Curiam this is no eſcape, but he muſt be carried back. 33 Ed. 1. in the Tally Office there is a fair Copy of ſuch Habeas Corpus's diſcuſſed; and in Riccabies Caſe, Stiles 369. pl. 800. (30) Hab. Corpus.

Dominus

Dominus Rex and Bullock, *&c.*

(94) Pardon. The Court were of opinion that the pardon De felonica Interfectione, with a non obstante on Sir Thomas Lucas Case 22 Jac. & 12 Co. which first broke the Ice to leave out the word Murder, is sufficient, and so they said Rolls Chief Justice his opinion was in Stiles 369. pl. 800. Ricabies Case, the other three Judges were contrary, and he delivered their opinion as of the Court: And he was sent down to Durham, and there found guilty of Manslaughter, and so discharged.

DE

AT CHELMSFORD IN Lent-Assizes,

26 Car. II. Before

Windham Justice of C. B. Sole.

Mond. March 23. An. 1673.

Brickwood *and* Nutt.

IN a Replevin the Defendant made Conusance, as Bailiff to the Mayor, Burgeses and Commonalty of Maldon in Essex, for a Land Cheap, viz. 10 d. to be paid by the Purchasor, for every mark of all Lands purchased; and prescribed, that they and all those whose Estates they have in the Borough have had, &c. and used for non-payment to distrain for the same; the Evidence was only of one distress taken 5 years sithence, but the duty being constantly paid ever since the time of H. 7. that was held sufficient, as well for Copyhold as Freehold; and though the Plaintiff shewed an ancient grant by the Bishop of London, of whose Manno the place in question was parcel made in the time of 9 H. 4. of this and other liberties, parcel of the Dominion of the said Manno to some particular members by name of the Borough, & toti Communitati, to them and their Heirs and Successors, which both destroyed the prescription as alledged in Mayor, &c. and also made the que Estate void, by severance of the liberties from the Manno, yet as the Court intended, a Recovery in the Case of Ferers against a (1) Intendment

lineal discent to Entail, made in Ed. the thirds time of Peter de Ferrariis, or Act of Parliament since. So Windham said the Court will presume this was either void or never executed: and so put him to prove the execution, and in default thereof he was nonsuited after full Evidence.

Abbot *and* Sorrel.

(2) Ejectment. IN Ejectment brought a by devisee of Rent on condition that if the Legacy be not paid annually, &c. that it shall be lawful for the Devisee to enter; and after the demand made this action was brought, and the Lease Entry and Ouster was confess. But by Windham Justice this is only of an Entry, sufficient to make the Lease that entitles to the action, not of an Entry that gives a title to the Land: And for not proving an actual Entry the Plaintiff was nonsuited, so it was said to have been ruled in Kent. In the Schoolmaster of Croydons Case last Assizes by Twisden Justice of B. R. but he had ruled it also contrary in another Case in the same Circuit, and it was said the opinion of Justice Wild was that actual Entry must be proved.

Sykes *against* Walls.

(3) Trover. TRover by the Plaintiff as Administrator of Joh. Gravenor; the case was that Jeremiah the first Administrator of John was cyted into the Spiritual Court to give better security, and for not appearing his Administration was repealed and committed to the Plaintiff one of his Sisters, whereof Jeremiah brought appeal, and pending that appeal delivered the goods to the Defendant, and then died. And by Windham notwithstanding 1 Roll. 5. & Moor pl. Isack and Clerk & 9 Co. Packmans Case, and Hern 87. &243. the appeal is now abated as if none had been; and so Trover lyeth on bare demand, and denial against the Bailee as it would have done against the first Administrator himself had there been no appeal, or the second Administration had been affirmed; whereupon the Defendant agreed to deliver the goods, &.

De

DE
Termino Paſchæ

26 *Car.* II. in *B. R.* Anno 1674.

Wedneſday, May 6.

Hale Ch. J. { *Rainsford* / *Wild.*

Smith *againſt* Newſam.

(1) Treſpaſs.

IN Treſpaſs of aſſault and Battery, on Verdict of the Aſſault, and not guilty of the Battery, being only of a Womans ſhaking a Sword againſt the Plaintiff in a Cutlers Shop, being on the other ſide the Street. Hales Chief Juſtice certified the Aſſault well proved: and now Saunders prayed no more coſts than damages, which was a Noble; & per Curiam it was granted: and Hale Chief Juſtice ſaid he certified induſtriouſly, thinking this not within the Statute unleſs the Battery had been found.

How *and* Stiles. *Thurſday*, May 1. *Modern.* 107. pl. 1.

(2) Surrender.

IN Ejectment the Plaintiff was leſſee of Fountain leſſee of Cook for 100 Years; which the Defendant inſiſted to be ſurrendered by Leaſe for a Year, made to Fountain the leſſee by Cook, and a Releaſe thereon; but per Curiam this is no ſurrender unleſs the firſt leſſee Seald a counter-part of the later Leaſe, or was preſent and actually received it, and that though the later Leaſe and Releaſe do after come into poſſeſſion of the firſt leſſee, this is no evidence of this aſſent to the later; but the Defendant could not prove any thing: and Verdict for the Plaintiff.

Waymonds *against* Abboab. Ante.

(3) Nosme. IN debt against Jacobus Abboab, the Defendant pleads in abatement that prædict. Abboab is called Jaacob and not Jaacobus, but being said called per nomen Jacobi, and the declaration de Jacobo, its well enough; and a Respondeas ouster Awarded per Curiam.

Dominus Rex and Throughgood.

(4) Ways. Offly prayed to quash the Indictment of stopping a Watercourse in Kensington ad Commune nocumentum omnium Legeorum ibidem Inhabitantium; which per Curiam on 2 Roll. 8. is ill, and quasht, Nisi.

Townsend *and* Gold.

(5) Estople. EX motione Polixphen for a new trial on prescription to dig for Lime-Kills. Hale Chief Justice said that in a personal Action the same parties, their Heirs nor Executors cannot try de novo on the same Issue while that stands, unless no advantage be taken of the Estople. But Twisden and Wild otherwise, as on prescription for Common, or Pasture, &c. But by Hale all is one; but the new trial was denied.

Peters *and* Prideux.

(6) Tithes. IN Prohibition where the Defendant suggests suit for Tith-Corn, and by Libel it appears that the Defendant permitted it to be so scattered that the Farmer could not take it, though it were set out; the Plaintiff saith it was Rakings, and not voluntary scatterings, and this was pleaded in Spiritual Court and refused; the Defendant saith that the plea was received, and the proceedings therein absque hoc that the Judg refused; the Plaintiff allows these Rakings, and that under colour of this the Judg proceeded; but per Curiam whether voluntary or not is no cause of Prohibition; but of appeal for this is within their conusance; but if they agree them Rakings, and involuntary scattered, and yet adjudg payment, a Prohibition lieth being contrary to our Law. Adjornatur.

The

The Bishop of Exeter *and* Star. Ante.

HAle Chief Justice said that this Obligation should be as the Writ de Excommunicato capiendo & de cautione admittenda in the name of the King, and not of the Bishop and Chancellor, as this is, else it would be mischievous; for were it in the Kings name, it were discharged by the last Act of Pardon, which dischargeth the Excommunication and the Offence of not obeying Mandata Ecclesiæ to that time, and this was drawn on by the former: and therefore for what is since the suit must be de novo, all which was agreed per Curiam, and that this would be a trap to proceed on such Bonds notwithstanding offences discharged, and the King ought to have the Mony, and not the Bishop nor his Chancellor; also Hale Chief Justice said that about 11 Car. 1. in C. B. it was held, Bonds taken for distribution though not void, yet were pleadable Colore Officii, and these Bonds would be as bad as Bail-bonds, if they should not fall by the principal, and as well as Bond is of 20 l. it may be of 2000 l. and in 10 Jac. 1 Bulstr. 122. such Bond was void, and Judgment for the Defendant, making a surmise of the Pardon, and that the Defendant is not excepted. (7) Ordinary.

Sutton *and* Hunt. *Friday*, May 8.

SYmson prayed the Sheriff of Middlesex might restore the overplus of Mony on Sale of Bricks made by him for 7. s. per 1000 on the place, for which he might have had 16 s. per 1000, and it was made by him: after the Plaintiff and Defendant appointed a third person to sell, the Defendant being Landlord, and having debt due for the Ground, did this to save his debt; and it was doubted, here being an absolute Sale, and not only a contract or agreement to sell, who should pay the overplus, whether the Sheriffs Executors, or Hunt; and the Court inclined that the Sheriffs Executors should repay, but ordered reference to the Secondary to prevent the Suit, and after the Sheriffs Executors were ordered to pay it. (8) Execution.

Brown

Brown *and* Bard *against* Palfry.
Two Causes.

(9) Church. LEvins prayed a Prohibition to Northumberland on Libel to repair the Church; the Defendant pleaded that he used to repair the Chappel: and in respect thereof was discharged, as to the repairs of the Church; which plea is accepted, but sentence against it, as Scot and Wall, Hetly 133. on modus denied, or another set up 3 Bulstr. 241. Weston for the Defendant, here is no prescription for another Church, but in discharge of that which is Libelled for; and of common right repairing the Chappel doth not discharge from repairs of the Church. Hale Chief Justice said, That on denial of modus a Prohibition shall go without any refusal, because else a modus may be set up of too great value; and this was agreed by him and Bridgman at Oxford Assizes, and the reason that the Bounds of Parishes is triable at Common-Law, is because the prescription is the ground thereof; Et per Curiam this is of right and not to be denied where grantable. Sed adjornatur, to be put in the Paper.

Bolton *and* Thomson.

(10) Trespass. ON motion of Thomson for a new trial in Trespass of Bricks broken in a Wall, or that the Defendant might have liberty to plead specially that this was the Freehold of the Lord of Darby, and that he as servant broke, &c. But by Hales Chief Justice and Twisden this is sufficient evidence on not guilty, and need not be pleaded no more by the servant of a stranger than by the servant of the owner of the Wall; but a new trial was Awarded for excessive damages.

David *and* Philips. *Saturday*, May 9.

(11) Utlary. IN Action upon the Case for Utlawing the Plaintiff in London who lived in Wales; the Defendant pleaded that he sued a Proclamation into the County where the Plaintiff lived, and Issue thereon; to which the Defendant demurred, and now prayed to set aside the Writ of Enquiry, and it was not denied; but this is a good plea if true, and according to Statute,

Baron

Brown *and* Benſen *and* Hudſon. *Hill.* 25. *and* 26 *Car.* II. Rot. 696. Ante.

ERror of Judgment in Lancaſt. in Replevin where the Plaintiffs made Conuſance as Bailiffs of Miſtreſs Ann Moſely, (12) Rents. that Rowland Covenanted to make Feoffment to the uſe of Rowland in Tail, with Remainder to others, then to his right Heirs, proviſo if no Iſſue be of Rowland, &c. Ann ſhall have a Rent charge till 2000 l. paid, and for arrears, Conuſance, is made; the Plaintiff below confeſſeth the Feoffment, but ſaith that Edward Moſely ſeiſed of the Entail levied a Fine, and ſuffered a Recovery; the Defendant ſaith that he made a Leaſe for 1000. years precedent, yet in being, to which the Plaintiff demurs: And Levins for the Defendant excepted to pleading the Fine, that before Juſtices A. and B. at Seſſions, Quidam finis factus, and that after finis Recordat' fuit, &c. not ſaid levat. nor ſhew any Kings Silver paid. 2. No execution of the Recovery is averred; ſo if no Entry were by it, the charge ſtill remains, and as to the main, held this Rent not Barred by Recovery, being ſuppoſed on feigned title, and no recompence can go to the grantee, 12 Ed. 4. which was grounded on 8 Ed. 3. Octavian Lumbards Caſe, where a ſatisfaction is for the releaſe which is alſo the reaſon of Dutton and Ingrams Caſe:

and common uſage of Recoveries is only grounded hereon, and on 9 Co. Beaumonds Caſe. 1 Cr. Stone and Newmans, the reſolution that Husbands Fine, and her recovery after Bars Iſſue of Feme, was only the Eſtople; not on their compence, or if it were on Voucher which bars all Eſtates, and this recovery cannot be preſumed on any Eign title, and therefore cannot be falſified. 2 This Rent is no Eſtate depending on the Land, but ſeparate from it, and is to ariſe on contingent poſſibility. And 3. had no being at the time of the Recovery; and the Fine can do no more than the Recovery, here being no Bar nor Eſtople, but the Recovery is the largeſt, which yet never Barred any Eſtate, but what was dependant upon the Eſtate recovered, and there can be no objection on Moor 13. pl. 201. which takes away the Eſtate only on which the power to ſell is grounded: But 3 Co. 727. & 792. White and Geeriſh recovery by Tenant, Barrs not Rent Iſſuing out of it: 2 Anderſon 92. Noy. 9. Becauſe the Rent was never diſplaced by the Recovery, and if this that

were

were in being was not displaced, a Fortiori our Case of Rent not in Esse cannot be displaced: as 5 Co. Saffins Case: Also this is a bare possibility: which as Pell and Browns Case can have no consideration or recompence; contingent Remainders are Estates in Esse, though no persons take: but in our Case there is a person to take, but no Estate: and as to 1 Co. 62. Capels Case that Rent charge grant by Remainder in Tail is barred by Recovery (which per Curiam can never be got over) this was only because the Remainder never took effect; but had the first Tenant in Tail granted the Rent, his Recovery would not barr it, a Fortiori, where charge is made by the Ancestor of the Tenant in Tail; and this Rent is not granted out of any Estate Tail, but a charge that in point of time ariseth out of the first Seisin of the Feoffees, and run over all the Estates till the contingent happen, and had the use been to have a Rent when Issue fails, this would not be barred. But by Hales Chief Justice being by the same Deed all is one notwithstanding 8 Co. Whitlocks Case, yet by Levins by the same Deed there can be no better way to charge. And on Godiers Case if by different Deeds its not Barred. 2. This charge will remain upon the Lease for years, so long as that is undestroyed, though it be granted out of the Remainder: For this comes into possession with the Rent. Finch Plaintiff, for the (Lord Keepers Son) on 1 Co. 62. Capells Case conceived the Rent Barred, because its a charge only upon the Remainder, and is no interest distinct from the Land: as in 3 Cr. 727. which was created with the Estate Tail, nor is this any interest precedent to the Estate Tail, but subsequent. And the Law never inverts the order of words, but ut res magis valeat quam pereat: as Co. Bredons Case, not where its to introduce a perpetuity, as in this Case, and in Goodiers Case, the Lease was first created, and as to the intended recompence this is not the sole reason of Recoveries, which in 9 Co. Beaumonds Case could not operate, yet as 9 Car. 1. Catesbies Case, and Leonard 157. all the Remainders are Barred, for the Law will not allow a cloud over any mans Estate, but takes all occasions to set them free: Also here is a recompence goeth with the Land, and its not necessary it should go to Rent: Also the Lease is created out of the Estate Tail, and that was sufficient to bound it: Also the Tail is Barred, so the Lease must continue as it was at first created: Also were this Lease out of both Estates the better consequence would be that so much of the Lease as ariseth out of the Reversion is Barred, so can never be subject to this Rent. Hales Chief Justice said if Tenant

nant in Tail had granted a rent charge, which would determine by his death, yet on his recovery its unavoidable, so a rent out of Reversion remains notwithstanding recovery by Tenant in Tail, the reason whereof is because they charge the Estates Tail, and so where Entail is made on a condition, no recovery will destroy the condition: therefore in 28 H. 8. cap. That act was made to enable recoverours to distrain without Attornment, for all that come under him are in the same plight, and in continuance of the Estate Tail; and so long all charges by the Tenant in Tail Bar him; and where he in Remainder grants a Rent or acknowledges a Statute, they are all gone by Recovery of the Tenant in Tail, because the Recoveror comes in Paramont the charges in continuance of the first Estate in Tail, the Bar of recoveries is on the recompence; and Issue shall not falsifie on the title where there is a recompence, because the Tail is put into the hands of the Vouchee, and must stand and fall with him. But there is another reason also of the Bar, viz. that at Common-Law the Tenant in Tail had a Fee simple, and no Remainder could be limited over; and the Donor had only a possibility on failer of Issue, but by W. 2 cap. 1. this is made a conditional Estate, yet the construction hath been that recovery hath been an inherent right of Conveiance, all one as if he were Tenant in Fee simple; not taken away by W. 2. cap. 1. and therefore it is that he that comes in under the Tenant in Tail is liable to all charges; to which no recompence can go, no more than to power to sell on failer of Issue, this Conveiance is excepted out of the Statute W. 2. cap. 1. the recompence is considerable as to the Issue in Tail, but not as to them in Remainder. The reason of 3 Cr. 727. opens the reason of this, that the recoverer comes in continuance of the Estate Tail. In 1 Co. Capells Case, the charge riseth precedent to the Remainder, but not to the Estate in Tail, so here Goodier and Clerks Case came out of Justice Barklies Quiver; on a settlement on young Trevers, late Secretary, on marriage with Mistress Hamden, it was agreed that had the Lease been created by the same Deed, it could never be, but it would be liable to the charge of the Tenant in Tail, whether by way of Remainder over on proviso, whence they made a precedent Lease by distinct Deed, &c. and in 9 Eliz. there was some question, whether a Remainder for years were Barred by a Recovery, because none can have recompence against whom seisin cannot be recovered; and that is only of Freehold, but its agreed contingent Remainder is Barred; and though the person be certain, yet as where it were, if Remain-

der in Tail pay to J. S. then to him in Fee, this is Barred by recovery, and so is the rent, and extinct and dead. 2. The Lease for years is not chargeable, if Tenant in Taile chargeth, and then makes a Lease according the Statute for three lives: In this case the rent will continue against the lessees for three lives; but it was heretofore a Moot point, whether Tenant in Tails lease would support this rent, being a Freehold, and no Assizes lay for the rent after, yet distress might, so the Freehold were determined by death of Issue in Tail, yet if the Lease for years were chargeable, it would be still so; but here if no lease had been, the Conusee of the fine comes in under the Entail, and the recovery is under him; and though this Estate be derived out of the Entail, yet its not lyable to the charges of them in Remainder, thus the rent of all Remainder men would be kept on foot, and shakes all Estates, but the Lessee comes in under the Estate Tail, which by the recovery is made contingent for ever, and the Lessee comes in of that Estate paramount the charge, so the Lease is of no value. Wild, before whom the Judgment was given, agreed in omnibus; so Twisden and Rainsford, on settlement to the use of A. for life, Remainder in Tail, Remainder in Fee to A. with power to make leases in possession or reversion, his Lease for 1000 years in present cannot be Barred by recovery of Tenant in Tail: but had A. made a Lease for 1000 years to begin after the death of the Tenant in Tail, that is Barred by the recovery; for though it be in a proviso its in the same Deed, and subsequent to the Remainder: and in 2 Cr. 590. Pell and Browns Case, he was not Tenant in Tail that suffered the recovery: but had an Estate determinable on such a contingent, to which the Estate was liable; but had there been a remainder it would be Barred by recovery of the Tenant in Tail: And Goodiers Case was affirmed in Error, that recovery did not Barr the precedent Lease, though in C. B. it was adjudged first the Lease continued in B. R. that it did not continue, and after that it did, &c. and this is the same with Capells Case; if the Tenant in Tail make a Lease for years, rendering rent, with condition to reenter, here recovery destroys the condition, but the rent remains being precedent to the Lease, but in the Case at Bar the rent is subsequent to the Lease, and is a riding charge upon the Estate, the reversion depends on it, and the consequence would be on the contrary, that the charges by him in remainder would light upon the lessees of the Tenant in Tail, made according to the Statute on failer of Issue, and Judgment affirmed, nisi; and on good advice a gift in Tail determinable on his non-payment

ment of 1000 l. and remainder to J. S. in Tail, Remainder to B. in Tail, on failer of Iſſue or non-payment, Tenant in Tail before non-payment ſuffered recovery, and then failed at the time of payment, yet being then Tenant in Tail the remainder was barred by the recovery. And 3. as to the pleading of the Fine, it is as anciently Fine of one Term being not proclaimed till another, but now all is together. 2. The recovery is quod recuperavit, and *no* Virtue Cujus he entered or was ſeiſed, but it appearing Edward Moſely died ſeiſed, the uſe will be intended to reſult to him, and this is only an exception, pro hac vice, and can never avoid the recovery nor the Fine.

Liſter *and* Stanly. In Error Br. 175. *Monday*, May 11.

IN Aſſumpſit 20 March, to pay Sup. 28 Diem martii tunc proximum ſequent. which by Sympſon in arreſt of Judgment is intended the next month a year after, On 12 Jac. Read and Abbington, Sed non allocatur, the Verdict finding Damages for the Plaintiff, it ſhall be intended the month current. 2. Its another was Indebitat. for 20 l. pro perquiſitione of certain Lands, not ſaid how or by what conveyance, ſed non allocatur. 3. Its whereas the Plaintiff in conſideration, the Plaintiff Aſſumpſit ſuper ſe (for the Defendant Aſſumpſit) and ſtaid Quouſque. (13) Dayes.

Laufier *and* Mereday.

IN Audita Querela, brought on Judgment after the day in Bank, as ſigned only on releaſe of the Plaintiff to one Defendant ſeparately ſued in Treſpaſs, Polixphen for the Plaintiff, in Audita Querela on nul tiel record pleaded, prayed that the now Plaintiff might have liberty to enter up the record, &c. but per Curiam, though here be good ground of Audita Querela (yet not upon the Judgment but) upon the releaſe by Twiſden, Contra by Rainsford and Wild, not till Judgment, yet the Defendant was ordered to bring in the Poſtea to the intent to plead this recovery, againſt one in the new action, and if it be ſigned they will give the now Plaintiff leave to enter the record; elſe not, had it been brought before the day in Bank, but being after the execution, was ſtaied till moved, &c. for elſe the Plaintiff will never enter his Judgment. (14) Audita Querela.

Stokes *and* Verryer.

(15) Rents. IN Replevin the Defendant avowed for moety of moety of rent, out of Gavelkind-land; to which the Plaintiff demurred, because it was discendable at Common-law, being created de novo; sed curia contra, on Randall and Writtles Case. And Judgment for the Defendant, Nisi.

Benson *and* Hudson. Ante.

(16) Remainder. HAles Ch. Just. on White and Geerish Case, said on gift in Tail of Knights service and rent, the recovery extinguisheth the tenure, but not the rent; but if it were on condition it were gone, unless it were annext to the rent, but then both are gone. But Tail to J. S. so long as the Tree stands, the remainder over, if recovery be before the contingent happen, its destroyed, for the recovery makes the Purchaser in continuing the Estate Tail, which Twisden, &c. agreed; but if the Estate Tail be spent after this recovery, rent granted by the Tenant in tail is gone; as Dower determines by Tenant in tails dying without Issue; so reservations all fall with the original Estate: but the reversion in Fee is not chargeable, till the remainder in tail be spent.

Bartrop *and* Gwillim. *Tuseday*, May 12.

(17) Abatement. SArjeant Baldwin prayed stay of Judgment on death of the Defendant after Verdict, and before the day in Bank, which per Cutiam on Sir John Dreydons Case, being an actual abatement of the Writ, and the Satute 17 Car. 2. 8. being expired in April last; and no Error lying in the Exchequer Chamber for this Error in fact, and on Affidavit of the death in Replevin, the Judgment was stayed, nisi. Contra on release, &c.

Newsam *and* Smith. Supra.

(18) IN Trespass of Assault and Battery, begun originally below, and removed hither by Habeas Corpus. Sanders prayed restitution of costs being given full, where domages was but a Noble; and not guilty as to the Battery, but the Assault is certified, & per Curiam, as on 21 Jac. cap. 16. on costs de incremento shall be awarded, but they inclined this was within the Statute 22 Car. 2. cap. 9. §. 14. to have full costs. Adjornatur.

Cole

Cole *and* Levingston. *Wensday*, May 13.

IN Ejectment the Defendants title was made by Disseisin, it was agreed if a man intrudes on the King, and the King during that grants over, as he was not out of possession, so neither is the Patentee. But 2. when the Patentee enters on the possessor Carter and makes a Lease, an actual Ouster will be intended, being before the time of delivering Declarations, and this being found in a special Verdict its sufficient evidence of a Disseisin; possessor is but a pernor of profits in the first Case, and in the latter it appearing, 3. That the first Disseisor was not in possession 5 year that discent takes away no Entry, though many years possession have been ever since; 32 H. 8. cap. 33. it was also urged for the Defendant, that during Disseisin the Disseisee levied a Fine, which on 2 Co. Bucklers Case is sufficient to extingish his right to the benefit of the Disseisor; Which Hales Chief Justice said was the question on the special Verdict 11 Car. 1. between young Valnore and Carters son, and held it did, but per Curiam, Fine of the Mannor will not be sufficient as to parcel, that by Disseisin is severed from the Mannor, but proof must be of Fine of that very Land by name, &c. the entry within 5 years after the last proclamation is sufficient, though not within 5 years of the Fine levied. And Verdict for the whole Benham-Farm it was also agreed that possession against the Kings title presumes Reversions out, &c. (19) Patents.

Backwell *and* Knipe.

IN Debt on obligation on Oyer, it was for performance of an award and on no award pleaded, the Plaintiff sets it forth, and breach for non-payment of money; to which the Defendant demurred, because the award being that the Plaintiff should make such an Affidavit before J. S. as the Defendant required, which per Curiam is ill, but breach being not assigned hereon, the saying he did not make such Affidavit is not material. And Judgment for the Plaintiff, Nisi. (20) Arbitrement.

Hallelas

Hallman *and* Scot.

(21) Lieu. SPecial Verdict in Ejectment that H. seised of Lands in Chesthunt, and not found that there was any other Town called Chesse, deviseth all his Lands at Chesse, which per Curiam is good enough; as I make my Cosin Bridges my Heir and Executor was held sufficient: also this passeth no Goods, no more than devise to H. and his Heirs passeth not a Term. And Judgment for the Defendant, nisi. 2. The lease was 24 of September, Hebendum, from Mich. next, Virtute Cujus the Plaintiff entred, not said when, which per Curiam is intended on the day after Michaelmas, but if it had been virtute Cujus he entred, Eod. 24. September, it were ill, but nil Capiat per Billam, Nisi.

Willington *and* Dawby.

(22) Administrators. IN Trover by Administrator of conversion before administration committed after the death of the Testator, it was excepted by Thompson, that this action lieth not no more then Trover of conversion between Bankruptie and Assignment, sed non allocatur, for per Curiam it lieth well enough in both cases; And so in Sir Thomas Barringtons Case, about 40 years since, where it was pleaded that the Administrator was never possessed and over-ruled, so Heb and Longs Case, and though in the Case of Bankruptie it was once held no Trover lay, but on specially shewing the Bailment before and conversion mean, yet it hath been since held to lie generally, and Trover by Bar. and Fem. Executors, the Count that they were possessed is well enough. And Judgment for the Plaintiff, Nisi.

Brittain *and* Haukinson.

(23) Execution. AFter Execution made out, the Defendants Attorny shewed a Writ of Error to the Plaintiffs Attorny, after which Execution is done, & per Curiam its well done; the Writ of Error not being allowed, with the Chief Justice within four days after making; but if it had been allowed, though the Sheriffs might be excused of the contempt, yet a Supersedeas is grantable; but per Curiam, keeping a Writ of Error in the Pocket is of no value after the four days; and the Court would not undo the Execution.

Remur

Remur *and* Remur. *Thursday*, May 14.

IN Assumpsit, in case the Plaintiff marry, Nicholas Remur the Defendant assumed to pay her 50 l. Stroud excepted in Arrest of Judgment, that the action is brought by the Feme alone, and the Husband not joyned, sed non allocatur, though it were payable presently, but being to be paid three months after the death of the Husband, its stronger: 2. Its to be paied in three months after the death, &c. and the death is 6. August 25 Car. 2. and the request in September, which is too late, sed non allocatur, for being payable at a time certain, there needs no request nor notice of the death. (24) Bar. and Fem.

Deakins *and* Overton.

ON time desired to plead: Hales Ch. Just. said he had prepared a Bill in Parliament, that all Officers that had cause of justification might in Trespass or false imprisonment plead general Issue, and give it in Evidence, though it were hard to direct Juries on the Not Guilty in such a case; but the Court ordered the Defendant to plead short, That he did it by process of the Marshalsie, &c. as on the Commissioners of Sewers, and that the Plaintiff by consent replied de injuria sua propria absque tali Causa: which on 8 Co. Crogats Case cannot be done without. Ex motione Sir James Butler, and time granted, Nisi. (25) Justification.

Corporation of London *and*

HAles Chief Justice on Hancocks Case in the Exchequer, where in a Quo warranto against the City of London, it was agreed that none could be witness for the City of London against the Hawkers untill they were Disfranchised, for he cannot surrender his Franchise by consent; and because the right was concerned, and every particular member liable to the Fine, he cautioned them so to do in this Case of Package, and so it was here in the Case of Water-Bailage;

and so they cautioned in another Case of Trespass now depending between them and Carter Defendant for the City of London, as Governors of Bridewell Hospital and Lord Dorset, who for this cause refused to proceed in the Tryal now at Bar. Hall (26) London.

Hall *and* Morton.

(27) Bar. and Fem.

IN Debt on obligation, on Oyer, the Defendat sets not forth the award, but pleads it in Curia prolat', and that it was to pay 4 l. 10 s. at such a day; the Plaintiff replies first demanding Oyer of the award, which was to pay 4 l. 10 s. and to give a general release, and saith the money was not paid, and Issue thereon; to which the Defendant demurred, & per Curiam, the plea of the Defendant was ill, for he should have set forth the whole award, and in Curia prolat' is not sufficient: Also the Plaintiffs demanding Oyer is ill, and he should have confest so much as pleaded; and that ulterius, it was awarded to release, &c. but all is aided by Issue on non-payment. And Jugment for the Plaintiff.

Holms *and* Taylor. Ante.

(28) Arbitrement.

HAles Chief Justice against 9 Ed. 4. that Battery by Bar. and Fem. on not guilty as to one, and guilty as to the other, is aided by Verdict, yet the Judgment there, is in Misericordia; but its no Barr to the Husband alone. But by Wild this of Trover would be a Barr in another action 24 Car. 1. Covenant insufficiently alledged the Defendant pleaded, and on Verdict for the Defendant, & quia videtur Curiæ quod narratio est insufficiens, therefore, nil Capiat with Judgment was pleaded after by the same Defendant in another action, and the Judgment being special it was no Barr, but had it been general it would; yet in 4 Co. Vavx Case, auterfoits aquit is no plea on insufficient Indiament, which 3. Inst. was rather because the Judgment Eat inde sine die may as well refer to the insufficiency of the Indament rather than to the acquital; not being said quod sit inde quietus, &c. but in this Case the eat inde sine die cannot refer to the insufficiency of the joyning of the actions, but must go to the whole Judgment which is wholly reversed for want of Eat inde sine die; and the Court inclined strongly this is not aided by Verdict, but clearly it would be ill on demurrer. Et abjornatur.

Patman

Patman *and* Stanard.

IN Debt the Defendant pleaded that Prædict. Ann the Plaintiff per nomen Ann Packman, utlegat' fuit in London, not said what day, which was pleaded Die in Barr and overruled; and this assigned for Error, & per Curiam, the want of the day is fatal; because the pleading need not set forth the Utlary, but nul tiel record must be pleaded; but as to the saying Ann Patman was Utlawed per nomen of Ann Packman its well enough, without saying she was known by one name and the other, so the Judgment might be good, and the blank makes the plea ill, not referring to the Writ, and it may be since the action: and it should be before the last Continuance, here is no Record can be produced; and Judgment affirmed nisi, and it should be Waviata of a woman and Oldsworths Case in Exchequer, Recovery of Lands called Dale in Barr of Recovery of Dale grounds, not averring them one and the same, yet per Curiam, the per nomen supplies the want of that averment, but if this had been pleaded without a blank though the day were wanting while the Utlawry were in force, it might be good. (29)

Newman *and* Rivet. *Error* Br. 148.

ERror of Judgment in the Pallas Court, where the declarer avers in fine that neither party were de Hospitio was assigned by Stroud, that one of the parties were de Hospitio, and so within the Marshalls Court which is the removable Court; and the other a new Patent of a first Court, and had here been no averment in the Declaration per Curiam he might have averred this for Error, though against the Record, as they might plead in other inferior Courts, that matter did arise out of Jurisdiction; but whether the same Law be not now by this averment, of which he might have had advantage, by taking Issue or demurrer, be not now waved in the one case as well as the other, was doubted, and the Court inclined it could not be assigned for Error; so in the Exchequer the plea that he is not debtor Domini Regis is always allowed before Imparlance, but not after unless the Court refuse, the plea being tendred and sworn, and this is action upon the Case, to which the Jurisdiction of the Marshalls extends, not which is a Court at Common-law, but restrained by Artic. Sup. Chart. cap. 3. And there they may averre (30)

by express liberty of the Statute that neither party are of the houshould, but this de Hospitio is a new Patent, and so it cannot be assigned for Error; and on the Case of the Marshalsie. Judgment affirmed, Nisi. 10 Co. 68.

Cary *and* Ward.

(31) Sc. Fa. against Leedhams Executors, and against two other surviving parties, against whom a joynt Judgment was; to which the Defendant the Executor demurs. And the Court on Lady Harvy and Norton conceived the charge survives, as on Bail, which is taken joynt and several, but never so entered; and though a Sc. Fa. lie against the Heir of the Deceased and the survivers, yet not against the Executor with the survivers, as Felthams Case in Exchequer, and in C. B. about 9 years since it was so ruled: so on 46 Ed. 3. 49. And Judgment for the Defendant, so whether Recognizance be joynt and several or not, if the Sc. F. be joynt no advantage can be taken of that.

Stover *and* Hastings. *Friday*, May 15.

(32) EX motione Stroud to accept Common-bail in Debt against the Defendant (by Commissioners assignee of Bankrupt) who bought goods before notice of the Bankrupsie, the Court said that now the Commissioners meddle not with the goods, being only bound by Execution, but with the Buyer for the money; and the Court conceived they could not have both money and goods; and the sale on the Judgment was precedent to the Commission taken out: Yet being between Father and Son special Bail was ordered; and payment by Debtor to Bankrupt before notice, if no Commission be sued out is good, and the Commissioners have no remedy.

Drew *and* Baily, *Lessee of* Davie. *Mich.* 25 *Car.* II. Rot. 178.

(33) DEbt as Executor of Susan Davy, on Bond for performance of Covenants in Lease, reserving 50 l. per An. Reddendo & solvendo prædict. Susan Davy her Heirs and Assigns, vel uni eorum, and the Tenant covenants with Susan to pay to her Heirs Executors Administrators and Assigns: The Defendant pleads that Susan Davy was possessed as Administratrix of Andrew Davy of a greater term and made this Lease

Lease, and that during her life the Defendant paid, and after was ready, but there was no Administrator de bonis non, &c. that demanded, &c. to which the Plaintiff saith Susan Davy made her Executors, and for Rent arrear not paid to the Heir nor Executor the action is brought. It was agreed this Rent doth yet continue upon Sacheverils Case. But whether this shall go to the Executors of Susan or to the Administrator de bonis non of Andrew the first Intestate with the Reversion, whether it be a rent incident to the reversion or due only by the contract was doubted. Polixphen for the Defendant, that it is incident to the reversion, and in the same condition with the profits in Auter Droit, and will be extended with the reversion. And 1 Inst. 46. Godbolt 729. pl. 396. Poph. 145. & 1 Roll. 344. Blaxton and Heaps Case is, that the Executor of the Husband shall have the Lease, because the Feme was no party to the Lease; but the stronger objection is that the Administrator de bonis non comes under the first Executor, and is a Successor to him. 1 Cr. 459. If this rent belongs not to the Plaintiff as assignee, which it cannot do to sever the rent from the reversion, then the covenant to pay it to Heirs Executors or Assignees will not alter the payment on Hub. 275. Else there would be two rents, one to go according to the reservation and another according to the covenant. 3. The Plaintiff hath alledged no demand after the death of Susan Davy, and so hath not entitled himself; but on performance generally the demand would be a departure, but here being pleaded there was no demand, on 3 Cr. 829. & 1 Co. 76. & Hub. 8. Entr. Constable Br. 2. Baker and Spains Case, 1 Roll. 466. a special demand ought to be. Gold for the Plaintiff, that the Executor of the Administrator shall have the rent; and its not incident to the reversion but in privity of the contract. Latch. 266. as Lit. Sect. 346. Reservation by Indenture to one joynt-tenant is sufficient; and unless the Executor have it the administrator de bonis non can never have it, because he comes in paramount. 2. There needs no demand, here being an express covenant to pay. Moor 637. pl. & 1 Roll. Spencer and Pain and Chapmans Case. Hales Chief Justice, if the Lessee covenants to perform articles in Indenture its sufficient to say the rent was demanded, but if there be an express covenant to pay the rent, there needs no demand. 3. The suit on this covenant must be in debet & Detinet as on her sale of Cattle, though this shall be Assets in her hands, yet the action is founded on the privity of the contract; and the Heir cannot have it, and the Administrator de bonis non cannot have it being paramount; and where the money is brought into Court on the Administrators Judgment

and Fi. Fa. this shall go to the Administrator de bonis non, yet if it were not thus executed the Administrator de bonis non could have no Sc. Fa. the rent here is an Amphibion, partly executed partly executory; and had the Administrator assigned the whole term, it were doubtful whether the rent passed to the assignee, and had the Husband and Wife joyned in Heaps Case the rent would go to the Wife, and he conceived that yet this shall be Assets, and the Executor of the Administrator shall be charged as Executor in his own wrong, because the contract ariseth in her own right; though the reversions be as Executor; as in accompt against the Executor, its only in Detinet because it refers to the former Debt, but of what ariseth in their own time its in debet & detinet; so upon Waste by Executors, which Rainsford and Wild agreed as Damages in Trespass, and Moor Executor by Decree in Chancery hath money paid, its Assets. Twisden doubted because the Executor of the Administrator hath no remedy to recover the rent in regard he hath not the reversion. Sed adjornatur.

Lawson *against* Crips.

(34) Privilledge. IN Debt the Defendant pleads that tempore Impetrat' Brevis he was and is an Attorny of C. B. and that such Attornies ought not to be sued in R. B. which as Foster and Barrington 1659. and Neve and Nelson should be in the affirmative, that in Querelis non tangent' Regem, they are used to be sued in C. B. & non alibi; to which the Plaintiff demurred because its a suit by Bill; & per Curiam, this is ill, so that omnes atornati non debent esse sued, is ill, but unde petit quod a curia dimittatur is well enough, and better than unde intendit quod curia Cognoscere velit, & Respond. Ouster, Nisi.

Lord Dorset *and* Carter. Ante.

(35) London. IN Trespass the Defendant justifies as Servant to the Mayor, Aldermen and Commonalty of the City of London, Governours of the Hospital of Bridewell by Patent, 7 Ed. 6. The witnesses being most Freemen of the City. Mainard the Kings Serjeant would not consent they should be sworn, & per Curiam in a Quo Warranto they could not be

be ſworn, becauſe each member is liable to the fine, but this being againſt Carter, or Suit againſt them as another Corporation, viz. Governours of the Hoſpital, this being in another capacity and the action not in the right, the poſſeſſion can be recovered againſt none but the Defendant Carter or ſuch as are of the Inhabitants of Bridewell, not againſt any Freeman or Citizen, as ſuch, by Hales Chief Juſtice and Wild, contra by Twiſden and Rainsford, but to avoid this queſtion, Jeofries for the City prayed time to try next Term, that in the mean time they might before the Mayor of London in his Court or at a Common-hall as moſt uſually procure a Temporary Diſfranchiſment of thoſe Witneſſes that were Freemen to enable them to be Witneſſes, which the Court granted.

Dominus Rex and St. Andrews-Holborn.
Saturday, May 16.

(36) Ways.

ON an Indictment of the Inhabitants of St. Andrews in London, on preſcription that they have uſed to repair Leather-Lane, that part that is in Middleſex. Hales Chief Juſtice ſaid that on not guilty nothing but the decay is in queſtion, and if any other Inhabitants uſe to repair, it muſt be ſpecially pleaded, and fetcht off by another Indictment by the Inhabitants of London againſt Middleſex. 2. The Indictment as at Common-law of the whole Pariſh, makes both that in London and that part in Middleſex contributory; and to charge the particular Inhabitants in London or Middleſex or particular Precinct, the Indictment muſt be ratione tenuræ or by preſcription, and not de Communi Jure to exempt the reſt of the Pariſh. Ex motione Twiſden for a day to plead.

Hawkins *and* Mills. *Hill* 25 & 26.
Rot. 865.

(37) Enqueſt.

ERror of Judgment below was aſſigned in the Venire Facias which was xii. &c. that this was in figures, ſed non allocatur, being in Text as uſed in B. R. but if it had been 12. &c. in Roman figures it would be Error, and Judgment affirmed.

Rog-ion

Rogerſon *and* Jacob.

(38) Executors.

ERror of Judgment in Norwich in debt againſt the Executor on Obligation; to which the Defendant pleads non dedicit factum, but prayed a Writ de Inquirendo de vero debito: alſo there is a Mutuatus on which Iſſue is joyned, and a Writ prayed Ven. Fa. ad triand. exitum Generally, and not tam ad triand. quam ad inquirend', but per Curiam the Iſſue is ſufficient, and the Common Entries being only ad triand. Judgment affirmed. Shouldham for the Defendant in Error, the Plaintiff below the Record is ad faciendum Jurat. inter partes prædict. ad triand. &c. 2. The condition is to pay at Alborough, and its not ſaid that Alborough was Infra Juriſdict. but no Iſſue being on ſolvit ad diem its well enough, for the debt may be payed at any place, and upon an Inquiratur de debito in London they enquire of payment any where: alſo the reaſon of this enquiry is becauſe party hath not paid at the day and place but by a cuſtomary payment, Judgment affirmed.

Holmes *and* Taylor. Ante.

(39) Joyndre.

HAles Chief Juſtice ſaid that it was adjudged ill in Flowerdiew, and Kellet. Mich. 11. Jac. 1. after Verdict on joyning Trover and Aſſumpſit, and Helier and Palmer, 1 Cr. 175, and Regiſter 162. & 1 Cr. 271. Slander and Conſpiracy joyned Hub. 184. Mich. 1652, Bouchar and Alford, Moor and Moor 3 Cr. 296. & 2 Jac. Taylor and Marſham, contra Hutt. 59. & 60. whether the Verdict and Damages were intire or ſeveral; but the Executors may bring debt for arrears in the Teſtators time and his own. And Judgment reverſed, niſi.

Royſton *and* Ivory.

(40) Slander.

JEofferis prayed Procedendo on ſuit of Feme Covert as ſole Merchant, as on calling Whore in London without returning the cuſtom of London, which the Court doubted, becauſe in ſome caſes they may be ſo ſued, and in ſome not; and the Court muſt be in B.R. aſcertained of their Juriſdiction, and ſo is 1 Cr. 69. in 3 Car. but the cuſtom being alledged in the declaration its ſufficient, & per Curiam, a Procedendo was awarded, niſi.

Smith

Smith *and* Nusam. Ante.

The Court conceived that no more costs be de Incremento than Damages, but whether the Court may not give more, if Jury give more, they doubted, & adjornatur to consult the practice of C. B. (41) Costs.

Taylor *and* Herbert.

IN Indebitat. & insimul computassent, the Defendant pleads the Statute of Usury, and that both Assumpsits are of the same sum, and that the bargain was that the Plaintiff should have a Broad piece, not said of what value, but Anglice a 22 s. piece for forbearance four days of ten pounds, which is but part of the demand which is of several 35 l. and nothing said of the rest; but being said for all the goods sold, its well enough on demurrer, and a plea to all: but if it were only to one Assumpsit it would be ill as to all. 2. The saying quæ est eadem is ill. Smith and Danvers; but if he had said the sale on account was but for ten pound, and by fraud and Covin the Plaintiff to highten that sum had added an Indebitatus of the same sum it would be well, but its impossible that on an account of ten pound, they can be found in arrear 35 l. And Judgment for the Plaintiff, Nisi. (42) Usury.

Backwel *and* Bardjew.

IN debt on obligation, the condition was to pay legacy devised by the last Will of J. S. The Defendant pleads that its true that J. S. did by his Last-will give the said legacy of 40 l. to the Plaintiff, as set forth, but saith that after J. S. did revoke that Last will and Testament, and after died, and by the latter left nothing thereby to the Plaintiff; to which the Plaintiff demurred, because being intended a Bond made after death of J. S. the Defendant is Estopt by the condition of the Bond, to say there was no such Last-will, especially no time of either Will being mentioned, which the Court agreed. And Judgment for the Plaintiff, Nisi, and if the Bond were before the party J. S. died, the Defendant hath undertaken and must pay it at his peril. (43)

Long

Long *and* Wharton.

(44) ERror of Judgment in debt on Obligation to pay 100 l. on Marriage of the Daughter, and if either Plaintiff or Defendant die before, nothing; the Defendant pleads the Statute of Uſury, and that this was for the Loan of 30 l. before delivered; to which the Plaintiff demurred, & per Curiam, this is plain Bottomree. And Judgment affirmed, Niſi.

Deering *and* Farrington. *Hill.* 25 & 26 *Car.* II. Rot. 221.

(45) IN Covenant on Deed in conſideration of 50 l. the Defendant hath ſold 500 l. part of loſs by ſtring of a Ship, with the benefit of the whole, which ſhall be recovered againſt any perſon, Prince or Potentate; after which 500 l. is ſaid paid to the Defendant, and he is ſaid to detain 500 l. to which the Defendant by Thomſon demurred, becauſe the words vendidit aſſignavit & tranſtulit, do not imply a Covenant, though annext to an intereſt in poſſeſſion: as 3 Cr. 157. & 1 Leonard 179. Langdidale: alſo 1 Roll. 519. Bedfords Caſe demiſe of goods let makes no Covenant, though things in poſſeſſion, a Fortiori here being but a Choſe in action. 2. Theſe ſhall not be extended 1 Browl 22. to more than the party can do, viz. to transfer his intereſt, but is rather void. Owen 136. But by Hales Chief Juſtice, though aſſign, ſet over and tranſpoſe, do not amount to Covenant againſt an Eign title, yet againſt the Covenantor himſelf it will amount to a Covenant, as a Covenant againſt all claiming by and under me; which abridgeth demiſe as to Strangers. But if I enter, Covenant lieth againſt me for the wrong, ſo upon the reſervation of rent to a Stranger, though debt lieth not by the Stranger, he may have an action of Covenant for non-payment; and ſo may the Leſſor, which the Court agreed. But 3. Whether the 500 l. were paid is Iſſuable, ſo is the not permitting to receive by detaining after requeſt; and though no place of paiment be, yet being a demand with place its good, and this is no maintenance unleſs it be ſpecially awarded to be ſo within the Statute for it doth not transfer the duty, but is a contract to transfer the benefit, as covenant to transfer. 4. The Law makes

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a Covenant whereever the party will contravene his agreement by Deed, and the parties agreed to refer to the Secondary to pay the Five hundred pound, discounting the charge of recovery.

Lord Mordant *against the Earl of* Peterborough. *Monday*, May 18.

IN Issue out of Chancery to try if the Defendant were Tenant in tail, or but for life; the Plaintiff claimed by Deed of a Lease and Release by the Earl, and Sealed by the Earl and Countess, wherein was a power of revocation, and was urged as a revocation of another settlement, 9 Car. 1. wherein was a proviso that the said Earl might by the consent of the Countess obtain in writing a revocation in the presence of 3 Witnesses: And it was doubted that her bare Sealing the later Deed was no sufficient assent to make a revocation, unless the later conveyance had been said to be by assent of her, or a mention of her consent in any other Clause, and there was reason to make her party to the later Deed to save her Joynture: and the Court conceived this no sufficient revocation, but directed it to be found specially, that there was no other consent; and if this be a revocation, its for the Plaintiff, but they would not direct that there was no other revocation: for as Snape and Turton a Lease for Years suspends the power of revocation during the Term, but none would venture on this, and its probable there was an actual revocation; but because the Issue was, if only Tenant for life, and it appears the Reversion in fee is in the Defendant; whereupon the Plaintiff was nonsuited. (46) Repealance.

Lutterel *and* Mosedale. *Thursday*, May 19.

IN debt against the Defendant, Marshal of B. R. on escape of Reynel on Nil debet pleaded; per Curiam the Defendant may give a fresh pursuit in evidence; and so by Wild of a Release, or any thing that destroys the duty. 2. It was urged on by Weston, 1 Roll. Elwis Case that after the Plaintiff had notice of escape, the Prisoner being returned to Prison, and accepted as Prisoner in Execution, (47) Escape.

doth discharge the former escape: Sed Curia contra. 3. Hales Chief Justice said that Habeas Corpus out of that Court to which the party is a Prisoner, doth justifie the Goaler in Assize-time, but otherwise if it be out of any other Court; but out of which soever, if the authority of the Writ be exceeded either in time or place at the pleasure of the Goaler or the Prisoner, it is an escape, and so here being carried a month before the Assize, and staying a month after; also the Habeas Corpus being at a place and a day certain, its no pretence of stay at other places, or ultra to search Writings or speak with Witnesses, and immediate is a convenient time without wilful delay. 4. That on the escape of any one on a joint Judgment and Execution, the debt lieth for the whole, especially if they be in several Prisons, as 5 Co. 87. Blumfields Case, though the duty wholly survived by the death of the party escaped before any Action brought, and though the Executors of the party dead is discharged: and in Mrs. Sanfords Case it was held that H. committed for Felony and escaping, the party shall be convict for that, though not for the principal Felony, and where she was Indicted for both, and acquitted of the principal, and being arraigned for the escape, it was the general opinion on pleading this special matter, that the Felony being discharged before the breaking of the Prison, doth discharge that: and in Caries Case Stroud said against him in Middlesex last Saturday, it was ruled that the death of one before the Action doth discharge the escape: but Hale Chief Justice and Rainsford, that it doth not: otherwise by Wild and Twisden, and they inclined that it be found specially to save the Marshal, else all inclined that debt is not discharged; otherwise of Action upon the Case, and Verdict for the Plaintiff.

Clifton *and* Cresley. *Friday*, May 22.

(48) Collusion.

The Plaintiffs Title in Ejectment was under the settlement of old Sir Gervas Clifton, whereby he was tenant for life, the Remainder to his Son Gervas (under whose Judgment the Defendant claimed) for life, the Remainder to the first Son of that Son in tail, and by Fine of Sir Gervas the Son whereby he committed a forfeiture; against which the Defendant excepted that the Deed of uses

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of the Fine was by agreement of all parties, the Father and Son in Remainder, and Gervas had contracted debts before: Et per Curiam though this be a forfeiture, yet being in the Family its an evidence of fraud, and is but a conveyance, as the custom to forfeit Copyhold in Wakefield. Also, 2. the Court agreed that Annual payment of 200 l. per Annum for Remainder for life of 5000 l. per Annum, was a valuable consideration, and hath been often so ruled; and though it be a great peny-worth, yet here being a contingent, that the Remainder may die in the life of the tenant for life, and so the Annuity is lost: this is a sufficient consideration, being bona fide to induce the making a later settlement.

Freeman *and* Taylor.

ON a Bill in Chancery to be relieved against the Heir of the Mortgagee for mony received after his Fathers death for a Release of Equity of Redemption. Finch Lord Keeper conceived this is no Assets in Law, to satisfie a Judgment acknowledged by the Mortgagee after the Mortgage and before the Release, being but a bare right, and being not Assets in Law, the Release being before the Bill exhibited is no fraud, and so not Assets in Equity Decreed for the Defendant; ut dicitur Verdict for the Plaintiff. (49) Assets.

Good *and* Ash. *Saturday*, May 23.

IN Ejectment the Plaintiffs Title was by Lease of a House by lessee of the Dean and Chapter of Winchester for three lives, which was delivered by the Corporation, and a Letter of Attorny made to deliver it on the Land; which Twisden Justice doubted was void, being a perfect Lease by Sealing, and the delivery after insignificant: but Hales Chief Justice said, that since he came to this Court it was ruled that the later execution is good, and the first Lease Seald is but as an Escrow, when the Leter of Attorny is delivered at the same time, so German and Willis, 3 Cr. 167. But, 2. The Dean and Chapter being out of possession, no- (50) Deeds.

thing passeth by the Lease and Entry on the Land, unless the tenants after attorned to the lessee of the Dean and Chapter, as four Cottagers did, but not the principal Farmer, and so its a Lease of part anciently let, reserving the whole Rent; which the Court inclined he might.

Ayers *and* Lenthall. *Monday*, May 25.

(51) Error. NOte by Hales Chief Justice pro lege, that anciently as 22 H. 6. 6. before the day in Bank, Error was not allowed, yet 1 Rich. 3. 4. the Record was thereby removed. Smith and Bowls 2 Roll. 492. Error. Teste before day in Bank not allowed, so in Jobson and Jobson and Smith and Lake 44 Eliz. the course was settled, but after variously practiced that Error, Teste before the Judgment or day in Bank, yet the Record was removed; but if the day of the Return were before Teste, it did not remove, but if upon declaration before Issue joyned Error be brought, the Court may allow it or not; and Stones Case in Norfolk Assizes, about three Years since, a Man Indicted of Barretry, pleaded in Summer, had day to try in Lent, and procured a Writ of Error Teste before the Assizes, which I disallowed, because it would spoil all practice, being before the Court of Oyer established, but the party was discharged by pardon, and so this came not in question. But in inferior Courts it would be mischievous if the Error might not be Teste before the Judgment, and the entry of the Judgment is not material, for that may be several Terms after. By Hale Chief Justice, and per Curiam, 2. In the Eschequer where the ancient course is held, the Chief Baron on the Writ of Error writes allocatur such a day; but in other Courts the Clerk of the Chief Justice writes recipitur such a day, and they seldom make the Roll: and since this there are four days after the shewing the Writ of Error to put in Bail, but on Error Teste the first day of Easter-Term, if it be not shewed nor allowed in four days, its no Supersedeas to the Court, but Execution after such Teste, and before, shewing to the Clerk, or allowance is not avoidable by Supersedeas, so is 20 H. 6. 4. Mich. 24. Car. 1. Stibbings and Gwin, and H. 40. Eliz. 3. Cr. 597. Carter and Peter: and on Fi. fa. and seisure if no Supersedeas come before Sale its good; but though Error

for be mean between seisure and sale, it doth not avoid it in 1649. Methold and Baud 2 Roll. 492. Tit. Supersedeas, Stiles 159. pl. and if Execution be executed before shewing or allowance of Error, its unavoidable; and anciently Error was either shewed to the Court, or allowed by the Chief Justice, which is since found inconvenient; but it would be as inconvenient if the bare taking out Error should without shewing or allowance be a Supersedeas. Twisden said that Trin. 5. Car. 1. Godbolt 439. it was settled on solemn argument, that the Writ of Error was the Supersedeas in it self, and there is no inconvenience, and if it be delivered, shewed or allowed before the Return thereof, its a sufficient Supersedeas; but if the Return be before the day in Bank, or of the Judgment, per Curiam its no Supersedeas: and by Hale Chief Justice Errors nor other Records are not returned till a Term after taken out, and sometimes longer; therefore its no reason to stay so long, which Rainsford and Wild agreed; and Wild said he knew it ruled, that allowance of Error after Execution taken out, and before executed, was a Supersedeas; but the Case in question was, That the Plaintiff had Judgment for security; after which the Defendant came in and prayed leave to plead, and before the rule is out procured a Writ of Error, and shewed it to the Plaintiff; after which the Plaintiff entered a second Judgment for want of a plea: and to which of these Judgments the Writ of Error should be applied was the question; & per Curiam its in the Plaintiffs Election to either, and so was applied to the last, and a Supersedeas thereon granted.

How *and* Stile.

IN evidence to a Jury at Bar in Ejectment, the question was Whether a Lease for Years, under which the Plaintiff claimed, was surrendered by the lessees taking a new Lease and Release from the lessor in fee; if J. F. to the use of the lessor for life, the Remainder to the first Son, and the Heirs Males of his body, and so the other Sons, the Remainder to Richard Cook for 99 Years, if the lessor so long lived, the Remainder to the lessee and J. F. for their lives, if the lessor so long lived, &c. And Maynard for the Plaintiff conceived this no surrender, because Richard had but a possibility of a Term, and never was in possession, and so the lease (52) Surrender.

leſſee and J. F. had but a poſſibility of Freehold, which at moſt could be but a merger for his moiety, not of the whole. 2. On Ferrers Caſe he ſaid he knew it adjudged that a Leaſe for life to the leſſee for Years to the uſe of the leſſee, to the intent only to make him tenant to the Precipe to ſuffer a recovery, and to vouch J. D. was no ſurrender, ſo in Snape and Turtons Caſe, and a fortiori here, the Leaſe and Releaſe being to other uſes makes no ſurrender: and the Court agreed that the Leaſe and Releaſe to other uſes is no ſurrender. But Hales Chief Juſtice conceived that by the leſſees taking it, and the uſe of the new Leaſe and Releaſe being to him for life, though of it ſelf it were not ſurrendered, yet this admits the leſſor had power to contract for ſuch new Leaſes and intereſt; which muſt neceſſarily intend a ſurrender, becauſe it cannot otherwiſe be: And to this the Court inclined, but ordered it to be ſpecially found.

Green *and* Froud. *Wedneſday*, May 27. Ante. *Modern* 117 pl. 17.

(53) Deviſe.

IN Ejectment the Plaintiffs Title was by Will of Nicholas Froud, which was Entitled, Articles of agreement: And began, It is agreed between the ſaid Nicholas and Walter, that Nicholas being ſick in body gives, &c. In conſideration whereof the ſaid Walter promiſed to pay ſeveral Legacies: And the Concluſion is, In witneſs whereof the parties have interchangeably ſet to their Hands and Seals, and delivered as Act and Deed; yet on Moor pl. here being directions (as there by Letter) given to make a Will, and a perſon ſent for to that end and purpoſe, per Curiam this is a good Will; and being ſuch it is revocable, notwithſtanding Maynard for the Defendant ſaid it could not, being delivered as his Deed. 2. The Defendant claimed as Son of Peter the middle Brother of Michael, or Nicholas who made the Will, and Walter the deviſee, who were Sons of old Michael, tenant in tail; againſt which the Copy of a recovery under the Stewards hand in ancient demeſn was offered in evidence: the evidences being burnt, there was no Memorandum of it among the Records of the Court, and ſo no remedy by Error or falſe Judgment; yet per Curiam allowed on Peters Caſe of Briſtow, where an Exemplification under the Mayors hand, who was Judg of the Court, was by

by all the Judges of England allowed, though under the Town Seal there being no Entries of that Year: and Sir Paul Pinders Case, justification by Levari Facias out of the Eschequer, the Record being lost, it was proved by circumstances of orders leading thereto, and on demurrer upon that evidence it was ruled against Hales Chief Just. and Maynard, who demurred. So of a Decree of Houses burnt though not Enrolled; and in C. B. an exemplification of a recovery lost was allowed. 3. The Defendant excepted against the recovery, 14 Jac. that the recoverers Wife was in possession of the third part; yet per Curiam being so long since, the Court will presume a conditional surrender, though he continued in possession on the person of Gosberkirk where a license of appropriation was presumed, notwithstanding proof of Vicar endowed in possession, being enjoyed according to the appropriation. 4. It was said the tenant intail accepting a Fine, Come ceo it alters his Estate; Sed per Curiam it doth not, being supposed on a former precedent gift, which might be as well for confirmation of his Estate, as for transferring the Estate. 5. There is the Hundred of Kings-Clere, which hath divers Tithings distinct in the Parish, and the recovery is of Lands in the Parish; yet all Tithings having but one Constable, as Ames and Cowly on Lease of Rogers Case, of Blanford forum, Hill. 22 Car. 1. Rot. 642. it will be well enough, although there be several Courts or Constables in each Tithing, for a Mannor may have others lesse parcel, and a Writ of right close is Ballivo Manerii, and not like a Precipe here: and its of Lands in the Lordship and Tithing, and there being no Village named Kings Clere, the Parish comprehends all, especially Kings Clere being in the Margent which refers to the Mannor, and this is but Error at most, being within the Jurisdiction; so Precipe of ten Acres in Parochia de Dale is sufficient to except against the Writ, yet it cannot be assigned for Error, that its too general, so de Manerio is in abatement, that it should be in Ville, but its no Error, and Verdict for the Plaintiff.

Ravenscroft

Ravenscroft *and* Fouk. *Saturday*, May 30.

(54) Variance.

IN indebitatus Assumpsit for mony lent to the Defendant; the Defendant pleaded that it was lent to the Defendant and J. S. not to the Defendant sole; to which the Plaintiff demurred, because it amounts but to the general Issue; which the Court agreed, and Judgment for the Plaintiff. Nisi.

Dominus Rex and Richards.

(55) Utlary.

ERror having been assigned in person: Walcot in his absence spake to them in the Paper upon an Utlary on Conviction of Felony in stealing Cows, brought after the general pardon, being said Ad Assizas Goalæ, not said deliberandum; & per Curiam this is well assigned as to the manner and matter; and being only to avoid the seisure of the Lord by escheat the death of the party is not material, nor is the pardon, this being of particular interest on Scire facias against Lords mediate and immediate. Sed Adjornatur.

Hankes *Case*.

(56) Repeal.

MAsters excepted against a Prohibition in suit by one in equali gradu, for repeating of Administration granted to the Neece of the Mother of the deceast, because the Repeal was for the same suggestion, that the first Administration was neptis ex matre, whereas she was neptis ex sorore defuncti; but per Curiam this is a distinction without difference, being neptis ex sorore defuncti on the Mothers side; but there being an actual Repeal, the Prohibition comes too late, and will not set it up till the Appeal be depending which suspends that sentence. Post.

Dominus Rex and Cheyny.

(57) Coron.

DEn prayed a melius Inquirendum on a Coroners Inquest of a Deodand, which was that the right Wheel of a Waggon drawn with Horses, ran over and killed a Child, &c.

&c. But the Court refused to grant it for the danger of retaking up the Body, or the impossibility of it, if long since, buried, but they allowed to take any exceptions to quash it.

Hopkins *and* Wood. *Monday*, June 1.

(58) Execution.

SAunders prayed an amendment of Elegit Returned of a tenement, &c. a moiety whereof (not said of what Lands in particular) deliberari feci: To this Hale Chief Justice inclined, as where the Sheriffs Return is void there it may be quasht without Writ of Error: As where the Messuage called A. is 25 l. per Annum, and B. is 20 l. per Annum, and he delivered B. as moiety, this may be quasht; and where he delivers incertain moiety, its all one as if no moiety were delivered; and its as much a Record when its Filed, as where its entred on the Roll; but if the party accepted it, its well enough, as of the third part in Dower: but Wild otherwise that the not saying by meets and bounds, is only erronious, and the Court can do nothing on the Roll, as quia videtur Curiæ, that the Elegit is erronious, Ideo Ret. prædict. cassetur; also in evidence to the Jury the Court have refused to hear exceptions to the Elegit, that it was of more or less. But by Hales Chief Justice in these Cases, when nothing appears on Record, the Inquest is taken as true, unless exception be taken before the Filing, be it more or less; but where its apparent on the Record, its void: and to this the Court inclined, and ordered a Cassetur to be entred, ut supra, nisi.

Burdet *and*

(59) Account.

EX motione Raymond, to discharge the party taken by Capias ad computandum, because the sum was 9000 l. and the Declaration ill, and so it might be excepted in arrest of Judgment; but per Curiam this is more than an Award, for though a Writ of Error lie not thereon, yet a Scire Facias against the Executors doth, but no motion can be made in arrest of Judgment, nor the Court would not deliver him.

Michel *and* Rich.

(60) Assumpsit.

IN Assumpsit on mutual agreement to pay 5 l. due by the Defendant to the Plaintiff, in consideration whereof the Defendant assumed to pay after Verdict. Stroud excepted in arrest of Judgment that this is a void consideration, being to pay no more than due: The Court agreed that a consideration of paying without suit is sufficient; but not for an Assumpsit, because this adds no new remedy nor advantage, but an Assumpsit to pay five pound generally is good, though it were then due, otherwise here. Sed Adjornatur.

DE

DE
Termino Trinitatis

26 *Car.* II. in *B. R.* Anno 1674.

Friday, June 19.

Hale Ch. J. *Rainsford*
Twisden. *Wild.*

Silly *and* Silly. In Error Br. 137.

POlixphen for the Defendant prayed execution, notwithstanding Error in Parliament, the order of the Lords being only on reference to the Lord Witherington, &c. to search Precedents whether Writs of Error be abated by Prorogation, unless specially saved; and the report that they were not, to which the Lords agreed, & per Curiam, on Execution, unless it had been agreed to be abated, as well there as here. Post. 319. pl. 7. (1) Parliament.

Bishop of Chester *against* Jones.

IN action upon the Case in Scandalis Magnatum, and 300 l. Damages, Levari Fa. went to the Bishop of Bangor, returned that he had Sequestred, but had received no profits; Which by Maynard for the Defendant is ill, this being but as a Fi. Fa. the ordinary cannot Sequester, much less turn the Defendant out of possession of Parsonage, as here he hath done, which the Court agreed; and restitution awarded, Nisi. (2) Slander.

Read *and* Norfolk. *Modern* 122. pl. 28.

(38) Parliament. IN Assize of the Office of Serjeant at Arms, attending the King out of Parliament and the House of Commons in Parliament time; the Sheriff having been at the House of Commons Door, and it being lockt, returned as in Pl. Com. News and Scholastica's Case, that he had nothing nor no Baily whereby to be summoned: whereupon Sanders for the Plaintiff prayed the Assize Br. 121. by the Default, on 11 Co. James Baggs Case, and 10 Ed. 4. because Nient attach per 15 Jours, is no plea in B. R. which the Court agreed, and awarded the Assize, Nisi.

Randall *and* *Saturday*, June 20.

(39) Bail. EX motione Crosts to discharge Bail Bond given to the Sheriff, the money being paid before the return of the Writ, which Levins opposed, because he would declare for the party in another suit, or by the Bie, which is by a stranger to make the Bail liable, sed per Curiam, it was discharged and only a Common Bail or appearance of the party ordered.

Pybus *and* Mitford. Ante.

(40) Estate. IN Ejectment Michael Mitford Covenanted with Delaval, that as to Lands in Heaton it should be to the Heirs Males of the body of the Covenantor, on the body of Jane his second Wife, and if any use by this Indenture, 21 Jac. were raised to Ralph Mitford, the son of Jane, then for the Defendant, else for the Plaintiff the Heir of Michael by the first Wife. Holt for the Plaintiff that this is no Estate Tail, which he grounded on the Estate the Covenantor had, which being his ancient Estate there is no necessity it should be expressed: but if this be a new Estate, and raised by the Statute of Uses, then it must be expressed; and this being a new Use at Common-Law its executed by the Statute 7 Co. 13. Englefields Case, as well to the Covenantor himself as to a stranger. 2. This being a new Estate cannot arise by operation of Law, but by express words; And what is not derived out of Fee-simple, 1 Cr. 366. Seagood and Fry's Case, remains as

as at first, before the Conveyance, 1 Co. 123. and Uses are regulated since the Statute of Uses, by other Conveyances, as Bargain and Sail at Common-law passed a Fee, but since the Statute unless it be sibi & hæredibus, its but for life. 3. The intent of parties is not certain here to alter the State during the Covenantors life, therefore the limitation must be void, for there must, as 22 H. 6. 15. & Co. Lit. 8. be words to express the intent; for the Law supplies not defect of words, but only words obscure and ambiguous, 1 Leonard 256. was not grounded on its being a Use, but because it was a Will: as 13 H. 7. 13. and in no other case can an Estate pass by implication. 2 Leonard 70. pl. Challoner and Bowyer, the like omission in a Will as here in the Deed is held void, and Winch. 57. Buckley and Symmons case, limitation of Uses must persue the limitations at Common-law, as Moor 722. pl. Boydon and Walter, Feoffment to the use of J. S. after 100 years gives no mean Estate to the Feoffor, and 1 Co. 154. the Lord Pagets Case was an express Estate, created during the life of the Lord Paget, which wanting consideration is void, and results to the Covenantor; but here the Law doth not only dispose the use, which is its proper act, but creates a new Estate which cannot be, and as to Co. Lit. 22. Fenwick and Mitford, Moor 214. & 1 Leonard 182. & 1 Andr. 256. 3 Cr. 321. Read and Morpeth, have not that conceit of an Estate for life by implication, and the Feoffor had had the Estate in the mean time as well if the use had been to a stranger and Feesimple discended; and so the Purchace is rejected as on devise to the Eldest Son. 2. A covenant may be to a use, to commence after the death of the Covenantor, but here the Heir is not so to all intents, being Lit. Co. 24. not Heir at Common-law, and no Heir can be Purchasor unless the whole Fee-simple pass out of the Covenantor as it doth not. Weston for the Defendant, that use doth arise to the Heirs of the Covenantor, viz. to Ralph; and its not a bare future use, all the special matter and deaths being found; which the Court agreed: Also 2. there is great difference between implications to strangers, which is clear, as is said, cannot be, but to the party himself what he leaves out, that would be else in Abeiance, doth result to the Covenantor or Feoffor by implication, else all future uses would be void; and he agreed that the Heir was not intended here as a Purchasor; but to Heirs of a stranger: Poh. 4. would make them Purchasors, and in the Earl of Bedfords Case, had it been to him for years, Remainder in Tail, the Remainder to the right Heirs of the Earl of Bedford: on Dyer 111. pl. Mus-

grave

grave and Wharton he would be tenant in Tail, so in the Case at Bar on the reason of Pl.Com. 308. the use rising out of the Seisin of the Covenantor must result, else nothing is done by the Covenant, for the Seisin cannot be changed, nor no action of Covenant lieth thereon, therefore since the Statute the use is raised as before. 3. The intent is plain to provide for Ralph, because Robert his Eldest Son was in being and provided for before; and that a future use will arise by Covenant or Feoffment, appears by Co. Mildmaies Case, and here nothing is done by the Covenantor whereby the Covenantee should not so stand seised, therefore of necessity the Covenantors Estate stands as it was till the accident happen, and on a Feoffment the use is so imployed: 1 Co. 15. Lord Pagets Case is not answerable. To the Heirs of his own body confounds the particular Estate into an inheritance, being not consistent with it, so he is now as tenant in Tail, otherwise of such limitation to Heirs of the body of such strangers, which is enforced by Co. Lit. 22. & 2 Co. In Bingbams case its said the old use results: And Dyer 134. pl. & Hub. 31. where the Heirs of the part of the Father take by limitation on Feoffment of Lands of the part of the Mother, to the right Heirs of the Father, its as a Purchasor, or as a contingent Remainder notwithstanding several late opinions contra; for the old Seisin is not altered, and therefore such a divided interpretation shall not. As 1 Cr. Jenkins and Young be in this Case: And Lord Cobhams Case comes equitably to this, and by perswasion where Heirs Male of the Body, though disabled by attaint were set up by intent referring to the will, this being to make good the Estates. Hales Chief Justice doubted on the last point, that this may be a good Remainder, because he takes notice in the same Deed, that he hath an Eldest son by proviso that if Robert his Son and Heir apparent pay to Ralph, &c. the Estates Cease, so its not like Hub. 31. where the Law is to take out the person he must be there full Heir; but here it may be satisfied with Heir of the second Wife. 2. The limitation is no Purchase where the Ancestor takes freehold by the same conveyance; this is not differenced from Co. Lit. 22. where the conjunction of the Estate to the right Heirs is to the implyed Estate for life; its an Estate Tale, whether by way of limitation or Purchase: And 1 Co. 154. L. Pagets Case is the like, where the Estate resulted not from the Covenantees, so the limitation to Feoffees for his life is as void, but if an Estate were limited to take effect after such a time as there may, an Heir mean be it will be contingent as after 100 years, during which

which the Estate is discendible to all the Heirs, therefore shall not be diminished to an Estate for years to the Covenantor, so the Covenant after the death of J. S. to stand seised to the Heirs of the Covenantor, it would be more difficult, there being a mean Estate transmissible, but in this Case immediatly after the death of the Covenantor its to his Heirs, therefore its an implyed Estate for life, with limitation to his Heirs which are confounded in an Estate Tail, so an express limitation to the Covenantor is but the old Estate: and Dyer pl. Gresswalds Case on Feoffment, limitation to Heirs of the Feoffor creates no Estate, Heir being vertually in the Ancestor; and he shall give no more to them than to himself and his Heirs, but in Covenant such use is movable: But the other three incline strongly contra, that no implication shall be to the Covenantor because of an express limitation of other Lands to Covenantor and his Heirs, because all the Court lookt on the Case as doubtful and of great consequence. Adjurnatur.

Kendal *and* Pain.

(6) Appropriations.

IN a Prohibition where its set forth that the Church of Croplad is impropriate time out of mind, and the impropriators maintained a Curate, and were seised in Fee, and though the Plaintiff had duly paid Tythes, yet the Defendant libeled for Tythes; to which the Plaintiff pleaded he was not the person which was in the Spiritual Court refused; to which Defendant pleads that he was persona Instituta & Inducta, &c. absque hoc, that the Impropriators were seised in Fee; to which the Plaintiff demurred because their Seisin is not material, much less for the time before the action, but should be absque hoc, that they were seised modo & forma, or traversed absque hoc, that it was Impropriated. And Judgment for the Plaintiff, that no consultation be, which is no Bar. on 2. Ed. 6.

Silly *and* Silly. Ante. 315. pl. 1.

(7) Dower.

ERror of Judgment in Dower of 300. Acres of Pasture, and 300. Acres of Land on non-tenure pleaded to the whole, the Jury find the Defendant tenant of more Acres of Land than is demanded; and that the Husband died seised; and Damages assessed accordingly, whereupon the Error is in

in Parliament; and these being distinct in the Writ, it must be as distinct in the Record, and this was assigned for Error here on Judgment in C. B. of the 100 Acres of Pasture, and 320 Acres of Land, & per Curiam, its Error, and not amendable now, but in C. B. the surplusage might be releast, but there must have been a new Writ of Enquiry. Et adjornatur.

Oaks *and* Cell.

(8) Sheriffs. DEbt on Obligation by the late Warden of the Fleet, condition to be true prisoner. The Defendant without pleading the Statute, saith it was pro deliberatione obtinend', and for ease and favour; to which the Plaintiff demurres, this being a private Statute, and must be pleaded as resolved, and at Common-law is not a void Bond, though not justifiable, sed curia contra, on Sir John Lenthall and Haughton, that this Bond is void at Common-law, but as Astons and Trussells Case, and Dyer its a general Statute not referred only to the Sheriff and his Officers, but to the Sheriff and the Officers aforementioned; and as on Corrupte agreatum, not said contra formam Statuti, shall be intended void, without pleading the Statute, so here 13 Eliz. cap. is held a general Law, because it concerns Leases of all Ecclesiastical persons, and here the it concerns all Goalers; and the Plaintiff hath agreed it for ease and delivery without satisfaction to the party, so its void at Common-law, but for ease or payment of Fees is good, prima facie; but not for Chamber rent, yet this is incroacht as Fee, and the Court would not give leave to discontinue. Adjornatur.

Dominus Rex against Barns *and* Clerk, *&c.*

(9) Joyndre. ROtherham excepted to indictment of Assault, Riot and Affray against them two Simul cum several others, whereof six pleaded and were found not guilty, because only these two are found guilty of throwing J. S. into a River; sed non allocatur, for per Curiam unless all the rest had pleaded and been acquitted, its well enough, for the rest may yet be tryed and found guilty, and thereupon they submitted to Fine, for per Curiam this is still good as an Assault at least.

Sir

Sir Thomas Lee *againſt Lord* Salisbury.
Monday, June 22.

(10) Fines.

IN Ejectment on Leaſe of Sir Tho. Lee Iſſue of Sir Francis, againſt which the Defendant ſhewed a Fine, by ſur Conceſſit Winter ſeiſed in fee Jure Uxoris, to the uſe of Bridget his Wife for life, remainder to Elizabeth the Mother of Sir Francis in tail, the remainder to the Husband for life, Remainder To Dr. Accomb and Hauton during the lives of the tenant for life, and her Husband as the ſurvivor, which was ſuppoſed a diſplacing, it being of a greater Eſtate; and warranty of Sir Olive Lee, a Collateral anceſtor that joyned in an after Bargain and Sale, diſcending on Sir Francis bound the entail: which Maynard for the Plaintiff denied that the Fine ſur Conceſſit can make any diſcontinuance nor diſplacing, being of Lands in Leaſe for years to Colebank. Hales Chief Juſtice ſaid it was no diſcontinuanc, nor would be any diſplacing, were Bar. and Feme tenants for life, but ſhe dying in life of Francis, being tenant for life, remainder to Elizabeth in tail, the Wife of Sir Francis, the remainder to the Husband for life, though the latter after-Fine Bar her new Fee, yet a Fine ſur conceſſit is only executory by Hab. ſa. ſeiſinam or by entry, and till execution proved its no diſplacing, but after it is as a Feoffment, and being as Garret and Blizard, Stiles 192. pl. 438. a Fine de toto Statu ac de tenementis, its as ſtrong: Alſo had the Wife not joyned in the laſt Fine, ſhe had had a fee by a former ſettlement, and a Reverſion now, but this fine being of a moety cannot be a Bar to this entail, which was to Bar. and Feme and the Heirs which he begot on her, which is tail in both, as Lit. Contra, had it been to the Heirs of the body of the Wife begot by the Husband, eſpecially this being as the grant of a Reverſion by one tenant in tail. 2. The Lands being in Leaſe, the Court though they will not intend Entry to ſupport a Bar, yet the Conuſee being but Servant of the Defendant, Ceſtui que uſe, an Entry muſt be intended or at leaſt an attornment, which is all one as Whites Caſe in 1 Co. 76. Bredons Caſe: Alſo on the ſpecial Verdict it was doubted if warranty may be annext to Bargain and Sale: Which Maynard ſaid he was this day to argue in C. B. and in 3 Co. 62. in Lincoln Colledge Caſe there was no warranty. 3. Whether warranty of Olive diſcending on the Heir of the Wife, will Bar

the Heir of the Husband and Wife: all which was specialy Verdict.

Bushel *against* Starling. *Thursday*, June 25.

(11) Enquest.

EX Motione Mr. Solicitor for Imparlance in action of false imprisonment for Fine set by the Defendant as Mayor on the Plaintiff, as Jury-man refusing or giving Verdict contrary to Evidence, which the Court granted, and said that no false imprisonment lieth, because no Writ of Error lieth on such an award or Judgment, but he must be delivered by Certiorari or Habeas Corpus and no other ways, this being done as the Judgment of a Court.

White *and* Stringer. *Friday*, June 26.

(12) Collusion.

IN Ejectment on Lease by Lord Tenham Son of the Lord Tenham, who on Marriage with Englefield and for 5000 l. and for affection to them and Uncles, &c. setled by Fine and Recovery to them two and the Issue Male, and for want of such to Issue by second Feme which the lessor of the Plaintiff was, after which three years being not indebted he sold by power reserved, the Lands in question, being two of 300 l. per An. for 2300 l. wherein his first Wives Daughter joyned, and the Defendant on Sir John Jacobs Case conceived this a good Conveyance as to Englefields Children, but the Defendant held it fraud; As to the Children of the second Wife, the Court agreed that a good bargain is no fraud; and also that a Conveyance may be good as to some and fradulent as to others, but the prospect here was remote, and the first Lady living, therefore cannot be intended fraud, for it must be fraud at first or not at all as to the parties; but against a Purchasor it would be fraud, unless as in this Case the Purchasor take notice of the setlement or take Collateral security, and in this case it was recited in the Deed of Purchase, and this is great evidence of fraud, but on 2 Cr. were fraud found the notice would not be material, and though the Statute 21 Jac. cap. of Bankrupts Damns voluntary conveiances, yet 27 Eliz. cap. 4. that voids voluntarily with power of Revocation, doth imply that voluntary conveyance without such power was good. 2. The Purchase was by fine, Sur Concessit for 500. years, which Mountague for the

the Defendant, on Co. Ventris Case, conceived that before the contingence happen of the second marriage, will charge it, sed non allocatur, for per Curiam, though on a Covenant to stand seised in futuro, it will charge, yet not so where an Estate is presently executed as here it is, nor is this like Bartons Case, Moor pl. because the Reversion for life interposing preserves the contingent. And. Verdict for the Plaintiff as to both points.

Courties *and* Daws. *Munday*, June 29.

(41) Joynder.

IN Indebitatus as Administrator for money received by the Intestate, and so much before that time had and received to her use, not said as Administrator which is in her own right, and an Insimul Computassent for the same money. Sir William Scrogs excepted in arrest of Judgment, that the Damages are intire, and this joining suo Jure, and as administrator, is ill, which the Court agreed unless the Damages had been severed, and Judgment staid.

Spencer *and* Kingsforth. Ante.

(43) Aminiſtrators.

SYmson prayed Prohibition to revocation of administration in the Arches on administration of Hank granted to one Sisters daughter, the suit being to grant it to the other or to both. Mr. Solicitor said the first administration was nepti ex matre defuncti, which was nonsence and out of form, and this is not on appeal but an original suit, so all mean acts will stand good, and it is not said Coment neptis, but per Curiam its well enough, as if it had been nepti ex sorrore which might conceal that there were other Sisters, and it might be nepti ex matre defuncta and well enough: also this is before the late Act, and so the revocation being made will stand notwithstanding any Prohibition, but this will stay the suit for the delivery up of the first administration: and Twisden and Wild held that after administration committed, all that is done after as revocation, &c. is Coram non Judice. But Hales Chief Justice, and Wild, if administration be granted pending, Caveat parte non vocata, no Prohibition ought to be notwithstanding pl. Offlies Case, & per Curiam, a Prohibition was granted, though this will not set up the repeal if unduly made, but there must be unless it be too late: A Mandamus to repeal that repeal, and chuse another as Abdies case, but the Court inclined strongly that

though a Mandamus lieth to commit the Administration to whom it belongs, yet not to Repeal a Repeal of an Administration. See Stiles 8 pl. 15.

The Mayor of Winchelsey. *Tuesday,* June 30. Ante.

(15) Taxes. ON a Certiorari to remove orders of Taxes made by the Mayor and Jurats there towards the Town charge, they Return the privilege of the Cinque-Ports, and that unless in criminal Causes, and such as concern the King they hold pleas, & Breve non currit, so ought not to Return; whereupon it was demurred: and now Barwel prayed a Procedendo, this being a civil Cause, and the Cinque-Ports bound by their Tenures to undergo the charges laid upon them by the Lord Warden, which they could not do without such a Tax, pro levamine Corporationis, as to find so many Ships advocantes se de libertatibus, which extends not to the Barons out-dwellers, but others that have Lands within them it doth, and though Tart too high, is not remediable here; but this being cumque etiam Breve regis non currit, not averring it did not, the Return is insufficient, and the Court ordered an amendment to Return the special matter that they were charged within War-time, and therefore Tart, &c. with a Protestando saving their Liberty and Priviledge of not Returning, but would not let them Return their Priviledge. 50 Ed. 3. 5. is to allow Priviledge by plea, not else.

Snelgrave *and* Fielding.

(16) Estople. DEbt on demise of Tithes, the Defendant pleads that nothing passed by the Indenture; to which the Plaintiff demurred; Et per Curiam he is estopt, this being of Tithes of the lessors own Land, and arising out of Farnham great Park, rendering Rent, &c. Here can be no apportionment, for if nothing passed out of Farnham, then all issueth out of the rest, and this being but to try the right of the payment of Tithes of Farnham-Parke: the Court conceived it ill; but if this had been a demise of all his Corn, Grain, &c. in D. it were no Estople, but as grant of the Land of the part of the Father; also where nothing passeth there can be no apportionment, but only upon an Eviction; and notwithstanding Smith and Banks Case, Judgment for the Plaintiff. Nisi.

Brown

Brown *and* Palfry. Ante.

IN a Prohibition, the ſuggeſtion was of repairs of a Parochial Chappel, & ratione inde were diſcharged of reparation of the Pariſh-Church of Aſton. Weſton oppoſed Prohibition, being too late after ſentence, as Hub. and becauſe the preſcription by cuſtom time out of mind to repair the Chappel ratione inde, not ſaid time out of mind, 2 Roll. 290. to be diſcharged of repairs of the Church is not ſufficient, eſpecially the Spiritual Court not differing in Judgment or trial hereof from the Common-Law, as on modus or preſcription of Freehold or Bounds of the Pariſh, or to queſtion Inſtitution, after Induction; and this is matter partly Spiritual, and indifferent to the Judg; Sed per Curiam where a preſcription is in queſtion the trial is at Common-Law, even for reparation of the Church; but the ratione inde is no ſufficient averment of the preſcription alone; but the cuſtom being to repair, & ratione inde to be diſcharged, its intire and one cuſtom: and were this a Chappel that had Sacramentum & Sacramentalia, Burials, &c. the preſcription would be good, otherwiſe of a bare private Chappel; but this being ſaid a Parochial Chappel, its well enough, 2 Roll. 291. and Prohibition granted, and to try this Aſſizes. (17) Church.

Poeton *and* Monday.

WInnington prayed a Conſultation upon a Prohibition in Suit to repeal a Super-Inſtitution, 2 H. 4. 17. it being a grant after an actual Induction of the Plaintiff, to the Rectory of Aſhbury; but if the Plaintiff that is Inducted were ſued by one Super-Inſtitute to avoid his Induction, Prohibition might be; ſed non allocatur, the Prohibition being actually ſerved, but the Court ordered trial there on this Aſſize. (18) Encumbent.

Williams *and* Pym.

SArjeant Maynard prayed mony paid by Bail on Execution againſt the Defendant, by Cap. ad Sat. might be brought into Court, ſed non allocatur, the Defendant being a Bankrupt ſince, and the Execution left with the Sheriff only to the intent to charge the Bail, not to take the party, and (19) Bail.

and this was a device by the Commissioners to charge this mony.

Lomax *and* Armorer. Ante.

(20) Error. ERror of Judgment in New-Castle on F. N. B. 47. B. & 3 Cr. 314. & 3 Cr. 101. in want of Original in Dower. Shafto said that though this cannot be good by Charter, yet by custom it may, as F.N.B. 7.& 3 Cr.426. in Copyhold-Court, which the Court granted as to Copyhold-Courts, but not else; but if by Law such a custom may be, there need not be any special custom alledged to hold pleas, but this as for trial by sir in Cornwal is a void custom, if specially Returned, and here its ad hanc Curiam venit, such a one, not said Secundum consuetudinem & petiit dotem, &c. Moor 422.pl.580. which per Curiam is ill, though the stile of the Court were ad Curiam tentam secundum consuetudinem, and several Charters. Sed Adjornatur.

Creeke *and* Norfolk. Ante.

(21) Assize. THe Defendant pleaded to the Writ of Assize, that the Writ was Returned Coram nobis apud Westm. not said ubicunque, sed non allocatur, the Court being here its well enough; as Fairfax Trin.1650 Rot. 1344. and so per Curiam hath been often ruled: and the reason is, because it was for the Plaintiffs convenience that it was ubicunque. 2. It was Summoneas XII. without an M over; which per Curiam is well enough in numeral Letters. 3. It was quod sint ibi, Aud. which should be ad audiendum, as Registr. 196. b. & F. N. B. 175. F. Sed per Curiam this may be intended auditurus, and so is well enough without ad. 4. It was si fec. which should be fecerit; sed non allocatur, and a Respondeas ouster was Awarded per Curiam.

Hales *and* Risley.

(22) Fines. IN Ejectment on Lease of the Lady Baltinglas, and Issue Female of the first Wife of Sir Peter Temple, the Son of Thomas, the Son of John, the Son of old Peter, on conveyance the 2 June 12 Jac. by Thomas to the use of Thomas for the joint lives of Thomas and Peter, on consideration of Marriage, and 700 l. per Annum with Anne Throgmorton, the Remainder to Peter for life, then to Anne, then to the Heirs Males,

Wales, the Remainder to all the Daughters of that Marriage, the Remainder to the eldest Issue Male of the second Wife, and the Remainder in fee to Thomas; the Defendant claimed from Sir Richard Temple, the Son of Sir Peter by the second Wife, on the precedent settlement of John, July 19 Eliz. to the use of himself, by Covenant, &c. for life, the Remainder to Thomas for life, the Remainder to Peter for life, the Remainder to the first Issue Male, &c. in tail, and that Thomas levied a Fine; whereupon the Defendant as Issue Male entred, the Deed was for natural affection, with power of revocation in John, that on Cancelling or altering any part the whole Indenture should be void; whereupon all parts of the Deed were shewed uncancelled. 2. The Plaintiff insisted that there was an agreement by Peter that was party to, and Seald a Deed, wherein Thomas covenanted that Thomas should levy a Fine, which being by Deed is a surrender of the Remainder for life in Peter. Hale Chief Justice said the joining in the Deed alone will not make a surrender, as Dyer pl. but the Remainder may Release to the Tenant for life but not surrender, but this must be wrought by the Deed and Fine, which here doth displace the Estate for life in the Remainder, but makes no surrender: Its true that Fine by the Tenant for life with such Remainder, the Remainder in fee to the use of the Remainder for life that is mean, doth drownd it, as 2 Co. 60. Wiscots Case, which the Court agreed, and where the Tenant for life, the Remainder for life, the Remainder in contingent tail levies a Fine to the use of himself for his and the life of the Remainder, this is but a remitter of the Estate of the mean Remainder, because your Entry is not taken away; in which Case the Statute of uses will make a remitter, though not so where the Entry is taken away, notwithstanding the Covenant of the Remainder Man; but here was no express Covenant by Peter, but an agreement in joyning in the Deed. Twisden said this Fine is a forfeiture, of which the Remainder for life can take advantage if he be not excluded by his agreement, and the contingent uses are hereby destroyed, and the next Remainder to them may enter, but it doth not appear here it did. Also, 2. It was said the settlement by John was fraudulent, being with power of revocation by Indorsement of John; Sed per Curiam the later settlement being not by John, but by his Son Thomas, its not fraudulent as to him, but only as to him that had the power of revocation, and had he Releast his power of Revocation first, he might not after convey: for 27 Eliz. Cap. 4. extends only where there

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is a power of Revocation then in being at the time of the later settlement, though there be a great deal of deceit, yet no fraud within the Statute in Thomas and Peter. 3. Old Peter 8 Apr. 13 Eliz. devised to John his Son for life, the Remainder to Thomas the Son of John (in Tail intend) to the Males of John, but said only in default of such Issue to Anthony, who is dead without Issue, and so a Covenant to stand seised by John is only for the life of John and Thomas; to which the Defendant answered, that being of Capite Lands is void for the third part; and as to the other two parts Thomas had Issue Anne the lessor of the Plaintiff, and Martha who was alive since the last settlement, and Anne having suffered a Recovery forfeited her moiety, which was in Hill. 1654. and reversed 1655. but an Entry was mean: So the forfeiture was not purged, and a special Verdict was on the first point whether the Remainder for life being party to a Deed, whereby the Tenant for life Covenanted alone to levie a Fine, which though the Defendant Sir Richard was born in the life of Thomas the Tenant for life, Thomas, yet being after the Fine levied doth not hinder the displacing of the third part, but his Father Sir Peter was of full age 12 Jac. when the Fine was levied.

Dominus Rex and Nelson. *Thursday*, July 2.

(23) Fines pro, &c. The Defendant being a Serjeant in London was committed in Execution for Fine in extorting Fees on arrest, and a third part allotted to the prosecutor: his Wife now petitioned to mitigate the Fine, being indebted for 330 l. paid for his place, and having Children and not able to pay the 40 Marks set on him, yet per Curiam they cannot mitigate, though the Court the same Term being set in open Court, as 1 Cr. 251. and they would rather Charitably contribute to relief; & respondeat superior holds not in Criminals, as here, but only in civil matters, yet recommended it to the Sheriff to pay this Fine in allowance of so great sums received, and estreated the Fine.

Black-

Blackborough & Uxor & Graves, & *alii*. Ante.
Hill. 24 & 25. *Car.* II. Rot. 1216.

TRover of a 100 load of Wood, special Verdict find Ayers seised of Copyhold and surrendered to the use of Agnes and Elen Hague for five years, and so to others, the Remainder to John in fee, John after had Issue John and three Daughters, and before admittance John the Father died, and after the Daughters were admitted, which is an admittance of the Son, so as to put the Estate in him, as to all, but the Lords Fine 4 Co. 23. a 3 Cr. 504. as Fine fur grant & render executed to one is so to all. 2. Trespass by one Tenant in Common against another is well enough on not guilty, and must be pleaded; sed per Curiam this need not be pleaded specially, otherwise of traverse by them against stranger, the Court conceived no Estate in Cestui que use till admittance, but if he die his Heir hath, but must pay his Fine. So Co. Lit. 22. & 23. & 3 Cr. Colkin and Cleve and Avery. In Clench and Grindals Case, Trin. 36 & 37 Eliz. B. R. the Court divided on surrender to A. Tenant for life, the Remainder in fee, A. was admitted, and the Remainder surrendered before admittance, and doubt whether any thing passed, but the Record being Admissi sunt was applied to both; and there is no inconvenience that the admission be applied to both, for if the Fine be for all, no injury is done; if only for the life, the other Fine of the Remainder is due when it falls, as on descent and surrender, the Estate vests, yet the Fine is due on admittance: and so the Conclusion being that if this admission of the Termor be an admission of the Remainder its sufficient to make a possessio fratris of the Reversion to the Plaintiff. So Baker and Tenham, Stiles 145. custom that every Copyholders younger Son shall take; it was held none take till admittance, otherwise on descent, and on surrender to the use of A. in fee, who dies and the Son is admitted, though this do not make a possessio fratris, yet it will entitle the younger as a purchasor; and in Baker and Denhams Case, the special Verdict was if B. were seised for the Plaintiff, he dying before admission. 2. The Trover was after the marriage, of Goods lost and converted before, and yet Trover by Baron and Feme is well brought, for debt lay by her before marriage, as on Bailment of Goods before marriage, they are in possession as to Trespass, or out as to Detinue; to some purposes this is but as a thing in Action, and the pro- (24) Copyhold.

perty not altered by marriage, as it is where Goods are in joyntenancy by marriage, the Joyntuee is severed and they are Tenants in Common, and its in the Husbands Election to Joyn or sue alone; and Judgment for the Plaintiff. Nisi.

Draper *and* Brightwell. Pasch. 26 *Car.* II. Rot. 320.

(25) Error.

DEbt on Judgment in B. R. the Defendant pleads removal and depending in the Exchequer-Chamber, absque hoc that it remains here; to which the Plaintiff demurred, because as to Bail its here, and it can be no bar, for it should be pleaded Nul tiel Record; or by Wild the Plaintiff might have replyed that there was; but by Hales this is not safe for the Plaintiff, but yet this is only in abatement, and it appears there is a Judgment, and so judicially the Court know its here; but on Nul tiel a Certiorari may go to the Justices of C. B. and Barons of the Exchequer as to some purposes. Twisden otherwise; but Judgment for the Plaintiff, as well with as without a traverse.

Hobson *and* Stubs. Hill. 25 & 26 *Car.* II. Rot. 797.

(26) Devise.

IN Repleven the Defendant Avows that Parker was seised in fee of Reversion of the House, out of which a Rent was reserved on Lease for Years, and devised to Thomas his Grand-Child and his Heirs Males, under whom Stubs claims; the Plaintiff replies, there was such a Will, but the Devise was with this exception of a Devise to Elizabeth for her life, after the expiration of the Term: and whether this were a future Devise or a present Estate was the doubt; & per Curiam its a present Estate, the mean space being filled up, the other is but terra revertens, as 38 Eliz. cited in C. B. in Kemels Case, the Covenant to stand seised to the use of the Son for 99 Years if he live, and after to another Son, held that the later was a present grant of Reversion closing on the other, though the life may out-live the Years, and Judgment for Hobson the Plaintiff. Nisi.

Robutham

Robutham *and* Baily. Hill. 25 & 26 *Car.* II. Rot. 700.

TRespass justifie by custom of Litchfield to seise Butter being not 18, but only 16 Ounces; on general demurrer it was not vi & armis, and so ill, being not barely for beating servants, per quod servitium amisit, but also its for the taking away Butter; and Judgment for the Defendant as to the Butter, eo quod Narratio est insufficiens, which is of little use, and the Plaintiff may take Issue on the loss of service notwithstanding: And the Court conceived the custom against Law. 3. Novem pondera Butyri hath been held ill in this Court without an Anglice what weight, but being novem Pond' generally it may be pondi as well as ponderis, so well enough, and Judgment accordingly. (27) Measures.

Rery *and* Capel.

ERror of Judgment in C. B. in debt on a Lease for a year, & sic de Anno in Annum so long as the parties agree, virtute cujus he was possessed, and yet is, and for Rent of a Year and a half the Action is brought, and the Error was that its not said when the lessee entred, so he might be a disseisor, nor that the lessee held it a Year and a half, &c. Sed per Curiam its well enough, being within the two Years, and being that the lessee was, and yet is possessed, its intended duly, unless he pleaded non habuit nec ocupavit; and Judgment affirmed. Nisi. (28) Leases.

The City of Exeter *and* Clare.

IN debt for Rent, the Defendant pleads Covenant in the same Indenture in bar of the whole Rent, that in Case of Land charges, the City Covenanted to abate 40 l. per Annum so long as they continued; to which the Plaintiff demurred; & per Curiam this is only a plea as to so much, not to the whole Rent: Also Wild held this a reciprocal Covenant only; sed per Curiam being in the same Indenture its pleadable, as an agreement in bar of so much; and Judgment for the Plaintiff. (29) Rents.

Peters *and* Prideux. Ante.

(30) Tithes. IN a Prohibition to a suit for fraudulent scattering of Tithes; the Plaintiff here suggests a plea refused of minus voluntarie scattered, and so no Tithes due; the Defendant saith, This plea was not refused, absque hoc that this plea was proved; the Plaintiff replies, That sentence, notwithstanding sufficient proof tendered, was given against the matter of the tender; to which the Defendant demurred supposing this a departure; sed per Curiam this is a special refusal, As where its replied bene & verum est the Judg received plea; but adjudged otherwise: but here being not said & sic Judex recusavit, there can be no Issue; and this is more properly evidence of refusal, and no Issue can be on the Judges intention, unless specially declared to be against our Law in the Decree, and not by suggestion of the party only that pretextu of Tithes being due of Tithes involuntary scattered, it was so Decreed. 2 Inst. 652. Sed adjornatur.

Austen *and* Austen. Mich. 25 *Car.* II. Rot. 454.

(31) Executors. ERror of Judgment in the Pallace of Canterbury in Action upon the Case by the nominal Executors against the Administrators on refusal of the Executorship to pay a debt, in Retraxit it was entred nolle prosequi per atornatum against the Plaintiff below, finding the matter out of the Jurisdiction, because by Den upon 8 Co. 58. this Retraxit would else be a bar to a new Action; but here Judgment reversed not for this, but for want of Misericordia entred as to the Plaintiff.

Newland *and* Dendy.

(32) Obligation. DEbt on Obligation 18 Car. 2. to pay 300 l. in six months next after after the Defendants marriage, the Defendant pleads primo deliberat' 22 Car. 2. and that no marriage was Post 22 Car. 2. hucusque; to which the Plaintiff demurred: & per Curiam though there can be no primo deliberat' before the day of the Date, yet after it may on Co. Goddards Case, but condition to pay Mony three months after the precedent marriage, which is impossible

ble, is a single Bond and good enough; but here being said made on discourse of marriage future, the averment that there was no marriage, is sufficient; also there need be no place where time is alledged in facto; contra where only by suggestion, and here being place precedent, its well enough. Sed adjornatur till answer in Chancery whether mony were paid and the old Bond torn, and a new one given of the same Date.

Waters *and* Rumsey. Trin. 25 *Car.* II. Rot. 1423.

(33) Bar. and Fem.

BAron & Feme Joyntress of the former Husband make a Lease for 11 Years, rendring Rent, with Covenant to levie Fine upon Concessit or any other Fine for Confirmation; after Baron & Feme levy Fine upon Conusance de droit to the lessee for Years to the use of Baron & Feme, and whether by this forfeiture the Lease shall be destroyed, was the question. Upon the special Verdict the Court agreed a Fine by the Tenant for life, though no use be declared, if Comeceo, is a forfeiture, otherwise of Fine upon Concessit, unless express use be declared, because no use results as the other doth; but the main question was on 11 H. 7. Cap. 20. if this Lease that may continue after her death, make any forfeiture on 3 Co. 50. Sir G. Browns Case, Entre Congeable Br. 140. Adjornatur.

Ireton *and* Newton. *Friday*, July 3.

(34) Lieu.

IN Trover of Trees, the Defendant pleaded that the Trees grew in Cheshire and not elsewhere, in abatement without traverse of Conversion elsewhere, or shewing any of the parties dwell there; to which the Plaintiff demurred, being worse than Mr. Crews Case, of Done and Rogers and the Court inclined it might not to be received, but being received, they on reading it as a Record would not presently over-rule it, because they said being for trial of Title was not proper here in Trover, but at last did; for though this cannot be pleaded generally to the Jurisdiction, yet specially shewing the Title in question it may.

Grace

Grace *and* Price. Ante.

(35) Verdict.

ON Dyer 34 pl. 23. Polixphen held the Verdict as to the Lands in Ballicore ill, & pro residuo not guilty, not saying how much is in Ballicore, yet 1 Cr. 471. pl. 546. its well enough; the Court agreed that such Judgment would be good till reversed, Moor 1656. Core and Web, Stiles Verdict of moiety and not guilty as to Lands in C. without destruction, yet held good ex motione Wild in arrest, &c. So 3 Cr. 465. Ejectment of Lands in several Vills, not said ubi, is intended in all, and here is sufficient certainty for the Sheriff to do Execution in the Vill, and this exception was moved in arrest of Judgment in Ireland and over-ruled, & per Curiam it may be well enough by custom of Ireland, and the Court would not reverse it.

Merrick *and* Hannam.

(36) Payment.

IN Assumpsit to pay the 24th of September, the Defendant pleads after the Assumpsit payment of part, not said by whom, and an agreement to pay the rest on demand, and that no demand ever was, and that she is yet ready to pay, proferend. to which the Plaintiff demurred; & per Curiam the not saying by whom, is ill; but had it been profert hic in Curia it would be a good bar: but Judgment for the Plaintiff.

Broom *and* Knights.

(37) Encumbent.

ACtion upon the Case by the Curate of Woodbridge on Discourse to leave the place, and of Mr. Sackford, the Impropriators intent to settle the Maintainance in consideration the Plaintiff would continue there, the Defendant being an Inhabitant promised to pay 40 s. quarterly, yearly upon demand: after non-Assumpsit, and Verdict, and Judgment, Error was assigned in want of demand, as 2 Cr. 639. Waters and Bridges being only licet sæpius, &c. Sed per Curiam here is a debt by the promise, and there needs no demand, as Cr. Pecke and Methold, and Leech and Bromsal, Stiles pl. In consideration of marriage to pay 1000 l. upon request, needs only licet sæpius, but otherwise to pay in consideration of promise of marriage upon request; and not-with-

withstanding 2 Cr. 183. Selman and King, here being a debt by serving the Cure, Assumpsit lieth; but however want of this is aided by Verdict, non Assumpsit and Judgment affirmed.

Smiths *and* Hadome. Ante.

(38) Costs.

The Court conceived that this being action of Assault and Battery, and only the Assault certified and proved, and not the Assault and Battery, he can have no more costs than Damages, being out of the Statute 21 Jac. cap. 16. being that no increase of costs be: but 23 Car. 2. cap. makes the Judgment of more costs void, which includes costs and damages that hereby increase not by the Verdict of the Jury, for the Statute never intended that if the damages found be 30 s. and increase 10. that then the party should have full costs as he must if the Statute extend to the increased costs, but the Court may give Judgment for what damages the Jury taxe, though only the Assault be certified and the residue of the money was delivered out of Court to the Defendant.

Holmes *and* Taylor. Ante.

(39) Joynder.

Lovell on search of Precedents, prayed Judgment, nothing of Flowerdew and Kellets Case being found, but Judgment is in Pember and Ashton, M. 1651 Stiles: Where Trover and Assumpsit were joyned, and not guilty as to one and Verdict as to the other, and Judgment affirmed. But Judgment for the Plaintiff, for all were ill.

Newman *and* Rivet. Error Br. 148. Ante.

(40) Error.

Error of Judgment in Pallas-Court, in debt on Obligation given for the Plaintiff, non est factum pleaded, with averment that neither party were de Hospitio, was assigned that one of the parties only was de Hospitio, which by Winnington is contrary to the record and cannot be assigned. And by Hales Chief Justice there is no difference between this and the Case of the Marshalsie. 10 Co. 68. But only that by Articuli super Chart. cap. 3. that is but affirmative, this negative;

gative; and though this might be excepted below before Judgment, yet it is not assignable for Error; so where action is of any thing said Infra Jurisd. Error cannot be assigned that its out; contrary if the matter were alleged out of the jurisdiction. As a suit in Southwark on fact inwarda de Cheap in London, but it was may be assigned for Error that J. S. before whom the cause was, was not Judge or Sheriff that return Ven. Fa. for that is no part of the Record, to which they pleaded; sed adjornatur.

Smith *and* Haws *Executors.* Trin. 24. *Car.* II. *Rot.* 1093. Ante.

(41) Assumpsit. IN Assumpsit on forbearance, and Assumpsit on an Insimul Computasset joyned: Sanders excepted on damages generally as to both, de bonis propriis, that an account is no sufficient consideration. Holt on Hutt. 27. contra, though the Law will not raise a promise, yet the stating of the account being as the consideration will be sufficient to charge the Executors de bonis propriis. Hales Chief Justice, Indebitatus after Verdict will be intended actual promise, as for Rent, and hath been ruled good, but on demurrer contrary, & Insimul Computasset is no sufficient consideration alone, unless specially alledged in consideration of stating the account; which then is a new consideration, and so the damages being de bonis propriis, and the latter promise on the account not charging the Defendant but as Executor, Judgment for the Defendant, Nisi.

Young *and* White. *Saturday*, July. 4.

(42) Tender. IN debt on Obligation to save harmless, the Defendant pleaded non Damnificatus, the Plaintiff replied that the money was not paid at the day per quod the Plaintiff became onerabilis and durst not go about his affairs, the Defendant rejoyned that the mony was tendered and refused absque hoc that the Defendant was chargeable; to which the Plaintiff demurred, because matter of Law is put in Issue, and now it was excepted that here is no speciall damage, as that any Writ was sued forth against the Plaintiff, but per Curiam its needless, and so hath been adjudged in C. B. and the saying he could not attend his business is sufficient. And Judgment for the Plaintiff.

Marshall

Marſhall *againſt* Wary. Ante.

INdebitatus in the City of York on ſale of Lands in Moreton, in the County at large; after Verdict Error was aſſigned in Ven. Fa. de Ballivo libertatis prædict. which per Curiam is ill, it appearing that as well Moreton as the City are Infra Juriſdictionem of the Baily. And Judgment reverſed, Niſi. Poſt. 344 pl. 50. (43) Viſn.

Hern *and* Hudſon.

DEbt on Obligation to pay 21 l. at full age; the Defendant pleads paiment of part, and Obligation for the reſt, not ſaid when: the Plaintiff replied by non-payment abſque hoc, that the Defendant gave new Bond at his full age; to which Defendant demurred, & per Curiam, one Bond is no ſatisfaction of another, if forfeited, eſpecially it not appearing here when it was given. And Judgment for the Plaintiff. (44) Payment.

The Mayor of London *and* Depeſtre.

DEbt for Scavage of Deal-boards imported by Cuſtom, the Defendant waged his Law; to which the Plaintiff demurs, this being grounded on duty, confirmed in Lond. 22 H. 8. c. 4. §. 4. by Act of Parliament, and ſo alledged. Levins for the Defendant, that Law may be waged againſt an Amerciament Co. Entries 118. Bendlos 39. by preſcription; and on By-law in Court Baron, but per Curiam, not on every By-Law, nor for any duty grounded on a preſcription, as for Toll, as in 30 Ed. 3. Noy 37. againſt Commiſſioner of Bankrupts Ley may be waged, becauſe the Statute puts them only in the ſame ſtate with the Bankrupt, and though theſe were no Aliens goods, yet Judgment for the Plaintiff. (45) London.

Forteſcue *and* Peters.

(46) Heir. REplevin the Defendant avowed for Rent on a Leaſe made by Francis Forteſcue, and that the Reverſion diſcended to the Defendent; the Plaintiff replies that before the Leaſe, Francis per bonas & ſufficientes Conveyentias, Conveyed to Specket, &c. not ſaid to what uſes; which were to uſe of the grantor, abſque hoc, that Francis was ſeiſed September 24. the time of the grant nec unquam poſtea; to which the Defendant demurred, becauſe this grant per bonas Conveyantias, not ſaid what, is ill, ſed non allocatur, 2. The Seiſin September 24. or ever after is traverſed, which ſhould be only of the Seiſin generally; ſed non allocatur, for the Iſſue may be on the Seiſin generally, notwithſtanding the unquam poſtea, and the parties are agreed ſo to do.

Pybus *and* Mitford. Ante.

(47) Eſtates. EJectment on a Leaſe of Graves of a Meſſuage leaſt, and Mills in Northumberland; ſpecial Verdict find M. M. was ſeiſed and had Iſſue Ralph by Jane, and by Indenture reciting Seiſin in Fee for Joynture to Jane and proviſion, Covenants to ſtand ſeiſed of the Reverſion, to the uſe of the Heirs male of Michael M. in Tail, the Remainder to his right Heirs; that Robert is Heir by former Venter, who inſeoft others to his own uſe, And that he dyed, and that his Wife marryed the Leſſor of the Plaintiff and with him levied a fine; and if any uſe were created by this deed 28. Jan. 21 Jac. to Ralph, for the Defendant. Wild for the Defendant, if Ralph takes any Eſtate by this Conveyance, though not as Ceſtui que uſe, but as Heir to the Father, the Judgment ſhall be for him: This deed of uſes for proviſion of younger Children ſhall eſpecially follow the grantors intention; he laboured not to make it operate as future uſe to make Ralph a Purchaſor, which Hub. cannot be, where the whole Eſtate is put out of the grantor this cannot be by uſe nor deviſe, had this Conveiance as Ruſſells Caſe been at Common-law by tranſmutation of poſſeſſion, no uſe to the Heirs Males could riſe; but in this Covenant no Eſtate is ſtirred, but only the appointment of the Covenantor where the Heir may take Quaſi per diſcent, where Anceſtor never could: 2 Roll. 794. and Woods Caſe 1 Co. 199. and the Eſtate is a diſtinct thing from the Land: and if 37 H. 8. by Whorwood were Law it were expreſſe

expresse in this point, there being no great difference between a Covenant to stand seised and a Feoffment to use, the use being the main. 2. For necessity the Law creates an Estate for life in the Ancestor, as Co. Lit. 22. by implication, which is grounded on intent of the parties as Will 13 H. 7. and 1 Leonard 259. Manning and Andrews, and this cannot possibly be made by future use, which would make Ralph a Purchasor, therefore here is an implied Estate in the Ancestor for life, so where the Covenant is to use of A. for life, Remainder to B. &c. if the Tenant for life refuse, the Covenantor shall retain it till the latter Remainder happen, and so is Lord Pagets Case: and Co. Lit. 22. & 2 Inst. its said this was a Reversion and not the old Remainder. 2. Rainsford for the Defendant, Michael had Issue Robert by the first and Ralph and others by the second Wife, and for provision of the latter he Covenants to stand seised of some Lands to the use of himself for life, Remainder to Ralph, but of the Lands in question to the Heirs Males of the body of the Covenantor, begotten on Jane; and the Plaintiff claims under Robert, the Defendant under Ralph, and a use doth arise to Ralph if he may take the benefit of the Conveiance: the scope and design thereof being not that Robert should have any part of these Lands, unless he paid 200 l. for the provision of younger Children, therefore in this case being of an Estate tail, the intention of Donor is to be supported as far as by rules of Law it may, and also because its to preserve use on a Covenant to stand seised. 1. This limitation is not void, but will bring the Estate to Ralph: Co. Lit. 23. so much of the use as is not disposed of remaining in Covenantor and Priority and Posteriority and Discent ex parte matris, Hub. 30. remained as before, which is the resolution 2 Co. 21. of Binghams Case, and of Fenwick, and Mitfords Case there cited in the Case of transmutation of the possession by Feoffment, a Fortiori on a Covenant as in the case in question, Michael shall during his life retain the Land as the old Reversion, for non est Hæres Viventis: as 1 Co. Archers Case, and the retainer is made good by Lord Pagets Case, Cited 1 Co. 154. which was affirmed by all the Judges in Exchequer Chamber; and agreeable to this it is in Dyer 310. pl. 79. & 1 Co. 129. & 2 Roll. 788. Butler and Simons Case, 21 H. 7. 18. had it been a Covenant to stand seised after the death of another, for here the Covenantor should retain the Land till the death upon the old use, which is not disposed of; and if there be an Estate tail in Michael, which discends to Ralph as

the Law is strong, it is sufficient for the Defendant, though he cannot take as Purchasor, being only Male, not Heir, as Hub. 30. he must be, nor is this within W. 2 cap. 1. but the Ancestor taking a Freehold, as 1 Co. Shellies Case, the Heirs after named take by limitation, as Co. Lit. 22. and no diversity where the Estate for life is created by Law, and where by party, and 1 Anderson 288. Moor 437. make nothing to this case, being but as a superinstitution: and 1 Anderson 259. Lord Pagets case is accordant, that its an Estate Tail executed. Twisden for the Plaintiff, that no use is raised by this Indenture to Ralph; this cannot be raised by a Will, as Hub. 31. but if it may, as it is in 1 Cr. Hoskinson and Wood, yet it cannot be so raised by a Deed; and it must be agreed, the words Heirs Males are words of Purchase: And I cannot in possession nor Remainder entail Lands to the heirs of my body, and where they come in by discent the Ancestor must take an Estate, and that he cannot do; and so the limitation is void. 1. This cannot be retained as part of the old use, and it cannot return, but as a new Estate: or as in Lord Pagets Case 1 Anderson 259. where the Estate is vested in another, but here no Estate vests in any by the limitation to the heirs Males, but is void; and there must be a vesting in somebody before it can return. 2. This cannot be any Estate for life in Michael by implication, though this be in case of a use which is guided by equity, being by deed, as 1 Cr. 366. Seagood and Holmes on surrender, which is by way of Conveyance: and to two equally to be divided, makes both joynt tenants; though in Will it makes tenants in Common: Also implication shall not work any disherison, as to the youngest Son after death of Wife gives no Estate to the Wife, Poph. 57. a fortiori in this case. 3. That this is by way of use, and so the intent is to be observed, is no objection; for Æquitas in this Case sequitur legem, and they cannot be made capable by way of use, that were not capable at Common-law; but remainder is void, as well in Feoffment to uses as in a Covenant, and the taking altogether doth neither shew sufficient intention that the Covenantor would take for life; for its not expressed, nor to be collected from any words in the Covenant: 1 Cr. 368. Spirt and Bence, being for disheriting of an heir must be apparent: and 1 Cr. 157. Angell the like, and here the intent is rather contrary, because, in other clauses he makes himself an express Estate for life, and its not mentioned, declared or limited actually, so in this clause, and the covenant is to stand seised to no other uses than are declared

clared, mentioned and limited; and this void limitation cannot turn into a reteyner, and in C. B. Flavil and Ventris, Covenant to use after Marriage, having Issue by former, Crawley and Vernon held the Wife should not be endowed; Hutton and Heath Contra. And I heard all the Arguments, and the general opinion was this way, the old use, and so agreed in one. Tookes Case in Norfolk it was never out of the covenantor, being able to settle in no body else. In Lord Pagets case the use vested once in William, so returned again, and as for Co. Lit. 22. its agreed the heir came in by discent, without any special construction of Law to raise an Estate for life first, or till the future use come in esse, which is strange; for the future use was never out of the Feoffor, so all that Paraphrase is to no purpose. Hales Chief Justice for the Defendant, Whether Ralph take by discent or purchase, the Verdict is answered, and the Issue is for the Defendant. And 1. as premise that he takes by discent, it must be agreed that an Estate for life, is in Mich. and whether by construction or express limitation, the Remainder to the heirs Males, is an Estate tail executed: It must also be agreed that whether it be parcel of old or new use it must lodge in Michael as long as he lives, for it can go no whether else; and in all cases concerning uses, the same deed may alter a use in Fee to an Estate tail in my self, but an Estate to A. Remainder to my self, the Remainder is void; and here is an Estate tail in Michael, because by operation of Law there is an Estate for life in Michael, which being annext to the Estate to the heirs Males, its as strong as a limitation to him for life, Remainder to the heirs of his body. 2. This limitation to the heirs Males is in effect a limitation to himself; but on limitation to the heirs Male of B. no Estate can result or go to him, but when he that had the Estate so limits it, if possible it shall go to him: also the intent is here apparent that Ralph the Issue by the second Feme should take, and that Robet his Heir should not take. 2. As to the Objections, that the use was never out of Michael, and so he hath the old use, to which this new use cannot be pieced to make one Estate executed, but it shall be a contingent use to the Heirs of the body, as on Covenant to stand seised to the use of the Son after Marriage 21 years, or after death of J. S. which are contingents: this is answered that the latter uses be contingent uses, because the Marriage may never happen, and the Estate will discend during the years, or till the death, which is impossible in the case in question to preserve the contingent uses. 2. That the

Estate

Estate ariseth by deed and not by Will; so shall not originally arise by implication, which is true; but here we are not to raise a new Estate to the Father Michael, but to qualifie an Estate to him, and modelling that which he hath to serve the limitations, thus Mich. 5 Car. 1. in 1 Cr. 161. pl. where devise to Son is qualified for payment of debts, he is not in by discent, nor its no Assets; but he is in as Purchasor: so in the case in question, the new qualification shall alter the Estate. 3. That Michael hath in another clause made an expess limitation to himself for life, he was mistaken in this, it being plain he intended the Estate to Ralph: Also in the former Case there were necessity to express it to himself for life, being limited after to Ralph and Robert, &c. Co. Lit. 22. is explained: Roll. Pannel and Lanes Case, and I rely on the Lord Pagets Case, which is not answered; for no Estate returned there, but being never executed was never out of him; and it could not return from the Covenantors nor Heir: Also the Lease for years could be no hinderance, the Term being ended, and now its all one as if Lord Paget had Covenanted to stand seised to the use of his Eldest Son for life, had this been a contingent use, the attainder being before the congent, Trin. 9 Jac. Moor 815. Pl. Palmers Case, gives all to the King without any contingent, and so he could never have had an Amoveas manum, Moor 343. pl. he had, whereas had not Lord Paget had an Estate by the operation of Law, the contingent in the Eldest Son had been gone: Moor Poph. 8. Englefields Case on 21 H. 7. is resolved this raiseth no use, if it did it would be contingent, but admit all that, had the Covenant been after his death to stand seised, there would have been an Estate left in him. 4. Were it not possible to take by discent, this would be a contingent use in the Heir by Purchase, being limited to the Heirs, which as to the Son cannot be executed till there is an Heir. But here a special Heir will serve the turn, and he need not be Heir and Male, being before W. 2 Cap. 1. taken notice of for an Heir of the body at Common-law, and its very apparent the same man in the same deed takes notice that Robert was his Heir apparent, and was to pay the mony to the Heirs of the body of Michael, therefore it were oppositum in objecto that he should be Heir and Male general, Lit. Sect. 352. this limitation is as near 12 H. 4. 3. as possible on condition to settle to A. and the Heirs Males of the second Wife, and in Mornivills Case Co. Lit. on Sect. 22. and Tail 23. there is no doubt but the Eldest Son of the second Wife may take, and no one case is against it; a special Heir may take by

Purchase

Purchase, as well as by discent. And Judgment for the Defendant, Hill. 26. Eliz. in C. B. by the whole Court, notice taking that the devisor had three Daughters; his heirs devise to the Wife, Remainder to his Executors for years, for paying to the Daughters portions, &c. the Remainder to his heir Male was contrary to Hub. 34. held to be a good Remainder to the Brothers Son.

Stedman *and* Aglionby. *Monday*, July 6.

SIR James Butler prayed for Lord Anglesie to set a side a rule for Judgment against the casual ejector, being Servant of the Duke of Richmonds heir that is lessor, the Action being of Easter Term last, and the demise and title of the Plaintiff is but two days before this Term, & per Curiam, this is but a trick to gain possession, as Sir Richard Minshaws Case, who delivered declaration in his Wives life time on lease then when he had title, as of subsequent time when she was dead; and its not fit to put the Tenant in possession to a Writ of Error, but set the last rule aside, and ordered that no farther proceeding be on this, but a new declaration. (52) Ejectment.

Crake *and* Norfolke. *Tuesday*, July 7. Ante.

IN an Assize now tryed at Bar, the plaint was of the Serjeant at Arms to the King, attending on the House of Commons in time of Parliament, alledging only a recovery of Damags in action upon the Case against this Defendant for disturbance, which was on suspension pleaded and traversed, of the taking Fees. On demurrer Judgment for the Plaintiff, and 400 l. damages, against which the Defendant excepted, that this was no sufficient seisin, there never being any Fees paid to the Plaintiff nor any other profits of the Office received; The Court inclined that this was a sufficient seisin, being a recovery against the same Defendant; as in 5 Ed. 4. 2. a return Irrepleviable is a seisin of a Rent against the same person, but against a stranger it would be otherwise, but this was allowed to be found specially. 2. It was (53) Parliament.

was an Office by Patent, and no Inveſtiture by the Kings delivery of the Mace ſhewed; ſed non allocatur, for on 9 Ed. 41. Bagots Caſe, he is a perfect Officer by the Patent, without Inveſtiture or admiſſion; and ſo was Seagars Caſe of Clarencieux King at Arms, but where the Office is elective, he is no compleat Officer till admittance, as Prebend muſt be Inſtalled, a Parſon inducted, and a Biſhop Reſtored to his Temporalities, before they can meddle with the poſſeſſion. 3. The Court agreed that a bare claim of the Office never ſo duely made, where it conſiſts not in Houſes Lands or other Corporal profits, but barely in a penancy of Fees is not ſufficient, but though the Court held this a good ſeiſin, yet rather than find the ſpecial matter, the Plaintiff was Nonſuit, and the Jury paid equally, and the Defendant had no Coſts.

Marſhall *and* Wray. Ante. 337 pl. 43.

(50) Viſne. FInch prayed Judgment on 2 Cr. 307. pl. 4. Clifton and Porters Caſe, the Ven. de Ballivo being after Verdict intended in the Neighbourhood, as Venire Facias de vicineto civitatis, had been good, ſed non allocatur, de civitate & de vicineto civitatis, is all one contra de ballivo, 21 Jac. cap. extending not this Caſe, it is Error, but de Ballivo Civitatis doth include the City; but a new form of Writs is not allowable in inferiour Courts; yet 21 Jac. cap. doth extend to inferiour Courts, but Judgment reverſed, Niſi, though Hales Chief Juſtice ſaid till he was againſt it.

Dunkin *and* Dunkin.

(51) Ordinary. SIR Francis Winnington prayed a Mandamus to the Prerogative, to prove the Will of one Dunkin, the Will being not in Conteſt; but delayed till the Executor gave account of his Teſtator, who was Adminiſtrator during minority, and notwithſtanding 4 Car. 1. it was denied, per Curiam.

Courtes

Courteis *and* Daws. *Wednesday*, July 8.

IN Assumpsit by Administrator in debt for money received to her use, not said ut Administrator, and insimul Computasset to her of money due to her as Administrator, and express Assumpsit to pay it to her; after Verdict Judgment was prayed, this not being like joyning promise made to the Testator and to the Administrator, as or as an account made by an Executor, joyned with Indebitatus in his own right, but shall now be intended an express promise, and the account is not alone sufficient for a promise; but as consideration that the Executor will give farther day, here the Declaration may be as Executor, or generally as in debt by the Executor on his Lease. Twisden contra fortiter on Hub. That the account being the ground of the promise; and that is in the Testators right, the promise express or implied chargeth but as Executor or Administrator, but per Curiam this is a new promise as Pigg and Malins Case, but all agreed that the damages recovered shall be Assets, and there is no difference of promise to Executor of debt, due to the Testator, and of promise on account, &c. And in the Exchequer the difference was adjudged between the Executor that accounts, that is not bound to it, and an account to the Excutor. And Judgment for the Plaintiff. (12) Administrators.

Dominus Rex and Burton.

IN Indictment of Perjury at Common-law, on Affidavit in Chancery, the Defendant demurred, supposing no Indictment lay, sed non allocatur, & per Curiam, it lieth not on the Statute 5 Eliz. cap. 9. on such Affidavit, but on depositions in Chancery it doth, but being but in mistake of the day of felling Wood two days before the Prohibition, the Court gave time to plead paying, the Costs, and said this would not be wilfull Perjury, if only by mistake. (13) Perjury.

Willington *and* Adderly.

(54) Common.

EX Motione Ireton to alter prescription for Common, said only when ground is untilled, and that he may lay it generally, which the Court granted, and said it hath been often adjudged that the prescription more large contains the lesse, as for 12 Cows is good for five, and for half a year is sufficient if it be found for more.

D E

DE
Termino Michaelis

26 *Car.* II. in *B. R.* Anno 1674.

Friday, October 23.

Hale Ch. J. *Rainsford*
Twisden. *Wild.*

Lord Gray *and* Charteer.

(1) Account.

IN a Suit for Account it was referred by rule: and now Mr. Solicitor on Death of Lord Gray the Testator, prayed for the Executor, that he may enter into the same rule; which the Court denied till common Bail entred and Action brought; though the Defendant consented to it: but Bonds in Court stay till reference ended or rule made to deliver them out, though all parties be out of Court.

Austen *and* King.

(2) Infant.

HAles prayed that the Infant lessor of the Plaintiff in Ejectment may be inspected, to the end to excuse him of costs. The Father who was the Guardian, and brought the Action not as Guardian, but in the name of the lessor, being dead since the nonsuit. Wild said in the Case of Turner in Exchequer on declaring in anothers name, one Gunnery, the Court made him that named him pay the costs, and not him that was named, having no notice, and so he conceived here; but his Executors having no Assets, Twisden said the Rule of Court doth bind Infants, being for his benefit if recovery had been, and the Rule was that the lessor

of the Plaintiff pay, &c. which if the Infant had delivered, the Declaration would have bound him; so here, to which Rainsford inclined. Sed adjornatur till the Court moved again.

Dunkins *Case.* Ante.

(3) Ordinary. SIR Francis Winnington prayed a Mandamus to prove a Will not Contested, as in Sir George Sands Case on F. N. B. 63. Mandamus to take caution: and Golds Case, 1652. Stiles Mandamus to affix the Seal to the Administration, there being debts abroad. Wild said a Mandamus doth lie to grant Administration upon the Statute 21 H. 8. Cap. 5. but a Will may be of non compos, of which the Ordinary is Judg, therefore no Mandamus lieth; to which the rest inclined, but the Will being not Contested, ordered to shew cause.

Silly *and* Silly. *Saturday,* October 24. Ante.

(4) Error. ERror of Judgment in C. B. in Dower of 300 Acres of Land, 100 Acres of Pasture, and several Tenements, Verdict is for 325 Acres of Land, parcel of the demand for the Demandant; as to the rest for the Defendant, which was assigned for Error by Serjeant Mainard on special Verdict. Polixphen for the Defendant on 1 Inst. 4 Dyer that Pasture is recoverable by the name of Land, and so the Verdict shall be intended to take in 25 Acres of Pasture as Land, the rather, because the Pasture may be Plowed up since the Writ, which is long since, seven Years before the Verdict, and so no Execution can be had of it as Pasture; but 11 Car. 1. Grodier and Watts case by Maynard, Verdict on unques seise que Dower for two Acres of Land and Pasture, not distinguishing how much of each, held Error: and though this may pass by Conveyance, yet not by Verdict in Breve adversario. 2. The Issue here is on the Tenancy at the time of the Writ brought, and so the after-alteration aids nothing. Twisden Justice held this an Error, if not amendable, but he conceived it is amendable as well now as before the Judgment, nullo habito respectu to the 25 Acres, and if C. B. might have amended it, so may B. R. but hereby all the damages and mean profits will be lost. Wild, nullo habito respectu is no amendment, but as a nolle prosequi as to part, and if C. B. do not amend, B. R. cannot after Judgment no more than

than if Verdict were of more mony than demanded. Judgment Reversed, nisi. The damages being 2d pro detentione, and the value is found to have them by the Statute, of Merton Cap. 4. and it may be reversed as to the value only.

Barford *and* Peell. Pasch. 25 *Car.* II. Rot. 375.

IN Scire Facias by the Administrator against the Defendant as Bail, the Defendant pleaded payment by the principal before the Sc. Fa. viz. the same day; to which the Plaintiff demurred, because after a Capias taken out its no plea, nor saves the Recognizance, but the Defendant should set forth when the Judgment was, and that before the Capias he paid it, that is good, being before forfeiture of the Recognizance. But by Weston for the Defendant, the Plaintiff should have replied, that such a day there was a Capias sued out, and that the payment was subsequent to it; for though Trin. 24. Car. 2. Rot. 412. Towers and Pridcalf, payment before the Return of Sc. Fa. by the principal, is no plea, yet before the Writ of Sc. Fa. brought it is by the Bail, which Wild Justice agreed; and its not like pleading the death of the principal, which must be said before the Return of the Writ of Capias, and the Plaintiff shall not be put to reply that there was a Capias such a day; but here are two pleas, payment triable per pais, and the Capias Issuing, which is triable by the Record; which the Court agreed, but here being no costs, nor Issue, being refused to be taken upon payment, the Court gave leave being a just debt to discontinue. (5) Bail.

Yelpe *and* Lawrence.

IN Assumpsit the 28th of September in consideration the Plaintiff would festinare maritagium with the Defendants Daughter, & haberet puerum infra 12 menses ex tunc proxime sequent. Smith in arrest of Judgment excepted that the having a Son within 12 months after the marriage, which was the 12th of November after, is not pursuant to the promise; sed non allocatur for the 12 months ex tunc must refer to the marriage, not to the time of the promise, and being said to be within 12 lunary months after the marriage, Judgment for the Plaintiff. (6) Days.

Jennings

Jennings *and* Hunkin.

(7) Slander. IN Action upon the Case for calling Perjured Rogue laid in Plymouth, the Defendant justifies by suit in C. B. tried in Cornwal on Affidavit, before Vaughan Chief Justice at Launceston. Stroud excepted that the trial by the Visn of Plymouth is ill, and should be of Launceston. Polixphen contra, that this is aided by the late Statute 16 Car. 2. Car. 8. as in Crofts and Winter, Pasch. 21 Car. 2. per Curiam the trial being where the Action is brought: and against Strike and Bates Case was Aderly against Wise a Covenant at London for enjoyment of Lands in Oxfordshire, the Defendant pleaded Feoffment there of that Land precedent to his Covenant to avoid it, and Issue thereon, and tried in London, where the Action was brought, and held good both in C. B. and here; and the Court agreed the trial good; but had it been res integra it were otherwise.

Morgan *against the Corps of* Carmarthen.

(8) Corporation. PArrot and Saunders prayed Process against them, there being Action upon the Case in the Eschequer against the Corps for false Return upon a Mandamus, wherein the Plaintiff was nonsuited, because it was not proved to be under the Common Seal; sed per Curiam the Return ought to be under the Common Seal, but however the shewing the Record of the Office is sufficient evidence and estople, to say it was not under Seal, and an Attachment will not lie against a Corporation, and they refused to make any Rule, and said the party ought to have offered a Bill of Exception, and not to aver now upon what point the Judg over-ruled him: viz. Turner Chief Baron at the Assizes last at Munmouth.

Dunkin *and* Brown. *Monday*, October 26. Ante.

(9) Executors. ON Mich. 22. Car. 1. Luskins and Carrer and Hill. 20 Jac. in the Countess of Berkshires Case, where a Mandamus was granted on the very same suggestion. Mr. Solicitor prayed a Mandamus to the Delegates; & per Curiam the Spiritual Court have nothing to do to call the Executor to account, or inspect his Books, nor because debts are not paid

paid refuſe probate, and though this be an appeal from the Prerogative by the Executor himſelf, Dr. Maſters oppoſed, becauſe a Caveat was entred in the Prerogative and gave the Juriſdiction, the Teſtator Dunkin being Adminiſtrator to Dunkin, during the minority of whoſe Children Brown the Brother was Guardian by Will, and entred the Caveat, and prayed Commiſſion to inſpect, which if ill granted by the Prerogative Court, they have loſt their Juriſdiction, & bene appellatum, and this being the ground of the Appeal and the Will of Dunkin not in controverſie, a Mandamus ought to be to the Prerogative, and leave them to Return that the cauſe is gone to the Delegates by Appeal, and the Adminiſtrator de bonis non of Dunkin, the Adminiſtrator ſhall call Brown to an account, and another Mandamus to the Delegates. Poſt.

Coltman *and* Barton.

IN evidence to the Jury at Bar, in Ejectment, the leſſor of the Plaintiff claimed as Daughter and Heir of Toby the Son of Thomas, the younger Brother of Lewis, who 9 Car. 1. ſettled his Eſtate to ſeveral in Tail, the Reverſion to his right Heirs, and the Tail is ſpent; the Defendants claimed by eſcheat on attainder of Francis Treſham the elder Brother of Lewis, who was attainted of the Powder Treaſon, but was never ſeiſed, and died before Lewis, but his Iſſue are yet living, and ſo ſtand in the Plaintiffs way as Heirs to Lewis of his eldeſt Brother, which Pemberton and Newdigate for the Plaintiff prayed to be found ſpecially. Francis being dead before, Lewis his attainder will lie no more in the way of the Plaintiff than if he had been an alien; which the Court agreed to find ſpecially; but it appearing Thomas was no Brother to Lewis, but a ſtranger, Verdict for the Defendant. (10) Diſcent.

St. Bar *and* Williams. *Thurſday*, October 27.

EX motione Serjeant Mainard for a new trial; the Court refuſed, unleſs the Certificate be that the Verdict was againſt evidence; which Vaughan Chief Juſtice refuſed to do, but ſaid ore tenus to the Judges of this Court, that it was againſt evidence; & per Curiam there ought to be a Certificate, which is as much a Record here, as the Affidavits among which its Filed; and though 1 Cr. Alexanders Caſe (11) Trials.

Case, being in an Attaint, the Jury refused to give Verdict; yet the Court said that were the Attaint grounded on the Statute it would not be so, were the Judgment not so penal; and because of that the new Trials were introduced; & per Curiam it was resolved by all the Judges in Bushels Case, that the Jury cannot in civil Causes be Fined for Verdict against the evidence, though in Criminals they may, and the motion was denied.

Johnson *and* Palgrave. Trin. 25 *Car.* II. Rot. 816.

(12) Obligation.

IN Covenant on Assignment of Obligation of Holt to the Testator of the Plaintiff, and to give a Letter of Attorny to the Defendant to sue, and not to revoke; the Defendant Covenants to give Bond to pay 100 l. within a year, and 400 l. after; the Defendant pleads the later Covenant was made in consideration of the Assignment, and that the Plaintiff hath Assigned; to which the Plaintiff demurred, becuse these are several Covenants, and this is an averment dehors. Saunders for the Defendant that the Assignment should precede, one being in consideration of another, and to be done before such a day; sed non allocatur, for several Covenants or Assumpsits are always in consideration one of another, yet being distinct, one is no bar of another; and Judgment for the Plaintiff: but Wild Justice said this Assignment is maintainance.

Fawkner *and* Annis.

(13) Privledge.

IN indebitatus, the Defendant pleads custom of Chancery, that all pleas concerning the Chancellor, and any the Clerks of the Chancery, ought to be pleaded and determined, Coram Cancellario, and not elsewhere, and avers he is a Clerk of the Inrolment Office, unde non intendit quod Curia cognoscere vult; not saying pro ut patet per recordum, nor where the Chancery is; which per Curiam is ill, and as to the Chancellor its void: however, because he cannot be Judg and party, a Respond. ouster was award, and it should be only that they ought to be impleaded, not to be determined there; for Issues between Chancery-men are triable at Common Law, and the plea must be avered, as was adjudged in Levingstons Case.

Dominus

Dominus Rex and Newton.

(14) Forgery.

Williams excepted in arrest of Judgment after Verdict of Indictment of Trespass, Forgery and Publication of the Deed of one Robotham in the Grand-Sessions in Wales; the Verdict find him in Chester guilty de transgr. & forgeria prædict. pro ut superius in Indictament. supponitur; which by Williams doth not comprehend the publication, and so a Venire facias de novo ought to be; sed non allocatur, this being all one with modo & formâ superius mentionat. as in Trespass of Assault and Battery, which are distinct in themselves; yet Verdict guilty de transgressione prædict. comprehends both, and Judgment pro Rege. 2. It was excepted on the Matters and Ironmongers of Chester against Radford in the Exchequer in Pasch. 26 Car. 2. that the Mittimus is to the Justice, whereas it ought to be to the Chamberlain of Chester, as that was to the Mayor immediately that should be to the Chamberlain, and from him to the Mayor; sed non allocatur, there being here a Mittimus both to the Justice and to the Chamberlain, and tried upon that to the Justice, being only for trial, and not on Original. Post 356 pl. 24.

Stouton *and* Berny.

(15) Prescription.

In Action upon the Case on Prescription that Occupiers ought to repair, and for default the Plaintiffs Cattle fell into a Ditch; which by Holt on 1 Cr. 419. is ill in arrest of Judgment; sed non allocatur, for though such Prescription by a Plaintiff were ill, yet good when laid in the Defendant, because the Plaintiff cannot know his Title. 2. The decay was said 1 Aprilis, per quod postea ratione inde the Cattle perisht; which doth not comprehend 1 Aprilis, sed non allocatur, though postea generally doth not, yet the ratione inde doth; and Judgment for the Plaintiff.

Nicholas *and* Cotterel.

(16) Courts.

Debt qui tam on 5 Eliz. Cap. 4. for using the Trade of a Mercer in Glocester. Melloy in arrest of Judgment excepted that this ought to be brought below before the Justices of Oyer and Justices of Peace, this being only

popular for punishment, and for no certainty to the Prosecutor; sed non allocatur, for per Curiam though Information cannot be Originally here, yet Actions qui tam may; and so settled in the Case of Hughs and Barns. But Wild Justice conceived that where-ever there is a remedy below by Information, &c. no remedy can be here, unless it be in Middlesex. And so in C. B. else contra to the intent of the Law, Information and popular Actions, by turning them into qui tam would illude the Statute.

Parker *and* Borne. *Wednesday*, October 28.

(17) Cinque-Ports. MR. Solicitor excepted against a Prohibition to the Cinque-Ports of Dover, on plea there in debt upon a Bond, that if any such Obligation were made, it was made out of the Jurisdiction, and not elsewhere; to which the Plaintiff there demurred, and the plea was there over-ruled; for which cause per Curiam the plea being ill, not being positive that it was out of the Jurisdiction; the Court said no Prohibition ought to be after demurrer, contra to the Ecclesiastick Court that have no Jurisdiction, and the Defendant refusing to render his Body here, or to give Bail, the Prohibition was discharged.

Sorrel *and* Lewin.

(18) Days. INdebitatus Assumpsit 1 Jan. 26 Car. 2. which is not yet come; to which the Defendant pleaded Infancy; the Plantiff replied it was for necessaries, on which there is Issue and Verdict. Symson excepted that here was as no day; which per Curiam is well enough now, and there should be special demurrer, but its aided by Verdict, which must be on evidence of a promise before Action, and a duty before the promise; and Judgment for the Plaintiff.

Everby *and* Lorby.

(19) Trials. EX motione Rainsford for a new trial in debt on Obligation found for the Defendant. Weston for the Plaintiff offered to Release on the Defendants Oath that he never Sealed or had paid, because this cannot be had by Bill in Chancery, being after Verdict; sed per Curiam the Verdict is no bar nor cause of demurrer till Judgment entred; whereupon they refused new trial.

Daniel

Corrupte: as on 5 Ed. 6. Cap. of striking in the Church, it must be said malitiose, so here it should be alledged sigillat. Et Adjornatur to search Precedents.

Dunel *and* Skidmore.

IN Trespass begun below, removed by the Defendant by Habeas Corpus in B. R. there tried, and 15 s. damages. Withens prayed full costs on 22 & 23 Car. 2. Cap. this being not first begun here, but in Pallace-Court and removed; sed non allocatur, for no Writ of Error would lie in the Exchequer-Chamber on Actions begun below and removed hither by Habeas Corpus, unless it may be said thereby begun here, on 31 Eliz. Cap. but Actions begun by Original in Chancery and removed hither, cannot be said begun here: and in Action in the Marshalsey removed hither by Habeas Corpus and tried here, and Verdict of the Assault and not of the Battery, yet ruled no more costs than damages. Smith and Newsams Case, and the Defendant thereupon had all his money out of the Court, but so much costs as the damages were. Sed Adjornatur, Wild being of opinion its not Originally begun here. (25) Costs.

Stroud *and* Hopkins. *Wednesday*, November. 4.

IN Action upon the Case, in consideration the Plaintiff permitteret the Defendant to occupy and injoy Lands until a future day, to pay 15 l. Levins excepted in arrest of Judgment after Verdict, that this is a Lease and not a bare Promise, and the Defendant had been nonsuited twice upon this point; sed non allocatur, for it shall now be intended an actual Promise: and therefore though Indebitatus will not lie on such permission, yet on actual Promise Assumpsit will. So Judgment for the Plaintiff. Nisi. (26) Assumpsit.

Willoughby

Willoughby *and* Huttolf Grove. *Friday*, November 6.

(28) Payment.

IN Iſſue out of Chancery on payment by Blanker the Father or his Son, under whom the Plaintiff claimed by a Statute entred into by B. the Father in regard the Defendant is the Executor of an Executor, and ſo in Chancery his Oath cannot be had, whether it were paid or not, as they might have had againſt the Executor or Adminiſtrator, it appeared that Capias ſi laicus iſſued out of Chancery on a Certificate thither by the Mayor of Salisbury, before whom the Statute was acknowledged, upon Return whereof in C. B. as it muſt be and Filed, with Cuſtos Brevium; on Statute Merchant Writs of Extent were Signed by Brownlow the Prothonotary, on view of the Statute without ſight of the Writ of Capias; after which on 5 H. 4. Cap. 12. the Statute need not be ſhewed, but that is ſufficient Proſecution; and Verdict for the Defendant, though it appeared not the Extent was Sealed.

Buſhel *againſt* Howel. *Saturday*, Novemb. 7.

(29) Action ſur Caſe.

SIR Will. Scrogs prayed Imparlance till next Term in Action upon the Caſe againſt the Defendant, the Recorder of London, and other the Judges of the Mayors Court, for Fining the Plaintiff and other Jurors, for Verdict againſt evidence in a civil Cauſe; which per Curiam was granted, and ſaid withal, that this Action will not lie againſt a Judg; and the C. B. were of the ſame opinion.

Miller *and* Miller *againſt* Potter.

(30) Executors.

POlixphen prayed a Prohibition to Exeter in a Suit againſt the Executor of the Adminiſtrator for diſtribution. 1. Becauſe in the Spiritual Court it was ſuggeſted that Obligations that were in their names as Obligees, were in truſt for the Adminiſtrator their Teſtator. 2. Other Bonds were altered by the Adminiſtrator, and new ones taken in name of the Adminiſtrator as Obligee; & per Curiam it was granted. For 1. This is a truſt which is matter of Equity, whereof they have no conuſance. 2. Though the Adminiſtrator might be ſued for diſtribution notwithſtanding the taking new Bonds in his own

own time, yet he dying, his Executor or Administrator cannot be sued, as a Feme indebted, makes the Husband liable during Coverture, but not his Executor after.

Holland *and* Ellis.

(31) Force.

MR. Solicitor prayed restitution notwithstanding Traverse put in to the Indictment of force found in Suffolk, and removed hither, on Dyer 122. pl. 34. this being in discretion, and the Plaintiff in possession by Hab. fa. possessionem, and put out by Justices of Peace, on pretence of another Indictment; Lambert and Dalt. cap. 84. Crompton but it was excepted to the Indictment that pacifice Intravit & extra tenet, not said vi & armis, was ill, which was agreed, but it was said that 37 H. 8. cap. 8. aids want of vi & armis in all Indictments. Adjornatur.

Corny *and* Cortes *against* Killingwod.

(32) Assumpsit.

IN Assumpsit against the daughter, in consideration the Bishop of Lincoln would at the Defendants request absolve the Mothers Excommunication, the Defendant would pay to the Plaintiffs Churchwardens late of D. such monies as she was tax to the reparation of the Church of West-Deeping: after Verdict for the Plaintiff Wingfield excepted in arrest of Judgment upon 1 Leonard 177. pl. that the action ought to be by the present Churchwardens, being a hurt, and personal thing, and not by the late Churchwardens, as here, sed non allocatur, for as Yelverton 1 pl. 3. Dett. Br. 79. Rippon and Norton, they to whom the Assumpsit was made, and to whose benefit it was may have the action; and here the Successors cannot have the action as on Trover they may. 2. It was excepted that the Defendant had no notice of the sums or absolution, as on Holms and Twists Case, where the matter lieth more in the Conusance of the Plaintiff than the Defendant, sed non allocatur, for the absolution is a matter of Record, equally known to both. 3. This promise by the daughter for the Mothers absolution is void, sed non allocatur being at the request of the Defendant, and executed, the Defendant hath a benefit, but it is not averred, ad tunc Gardiani existentes, either at the time of the Tare or at the time of the promise; and so its no more than to pay to a stranger on absolution

ſolution by the Biſhop, which is void as to ſtranger, and ſhould have been in conſideration that the Plaintiffs Conſentirent, that the Biſhop ſhould abſolve or procure, &c. and for this exception Judgment ſtayed. Ex motione Newdigate, for Judgment.

Dominus Rex and Wheeler. *Monday,* November 9.

(33) Mandamus. BArwell prayed a Mandamus to reſtore her to a Siſter of of the Hoſpital of St. Bartholomews where the King is Founder, to the Mayor of Sandwich and the Governors thereof, ſed non allocatur, theſe Almeſwomen being but at Will: And Wild Juſtice ſaid he turned out Charterhouſe-boys being mad, and no Mandamus; nor for a Blew-coat or other Almeſmen, but left them to the Viſitor.

Baily *and* Barrow.

(34) Aſſumpſit. ASumpſit in conſideration of payment of a years rent then due, and demanded of the Father by the Plaintiff, the Son aſſumed to pay money due for Fine on the Leaſe, after Verdict, Judgment for the Plaintiff, that its a good conſideration.

Aſtmall *and* Aſtmall. *Mich.* 25 *Car.* II. Rot. 427.

(35) Dower. ERror of Judgment in Dower, becauſe the view was denyed on pretence the Husband died ſeiſed, and Verdict finds the Husband did not dye ſeiſed. Levins Contra, that this being Dower unde nil habet, 45 Ed. 3. 17. view Br. 22. & 2 Roll. 725. 2 Inſt. 481. View lieth not at Common-law againſt Heir nor Purchaſor, but in a Writ of right its otherwiſe; Pelham, that in Co. Entr. 177. & 180. its Counter pleaded in Dower unde nil habet, Raſt. Entr. 239. 34 H. 6. 10. and Hengham and 34 H. 6. 3. where vir obiit ſeiſitus it lieth not, elſe it doth: and Rainsford and Wild ceteris abſent. that view is grantable. Adjornatur.

Oaks

Oaks *and* Cell. *Hill.* 25 & 26 *Car.* II. Rot. 624. Ante.

IN debt by the Warden of the Fleet; on Oyer the Defendant pleads it was for ease and favour, without setting forth the Statute; to which the Plaintiff demurred, & per Curiam, this is a publick Law and need not be pleaded, but the Plaintiff should Traverse the ease, and can never maintain this demurrer. Judgment for the Defendant, Nisi. (36) Sheriffs.

Watson *and* Parsons. *Trin.* 26 *Car.* II. Rot. 1287.

IN Trespass the Defendant Justifies as Bail on Attachment out of a three weeks Court in Bloomsbury, by custom to detain goods Attacht on plaint there untill the Defendant give security sufficient to satisfie the debt, and that there were four several plaints there; to which the Plaintiff demurred, each plaint being a sufficient justification; which the Court agreed, and that this custom is unreasonable, and should be only for appearance, not for the debt. (37) Process.

Austin *and* Austin. Ante.

ERror of Judgment on Retraxit in the Pallace-Court, in the Archbishop of Canterbury, because no Amerciament was set, which per Curiam should be. Adjornatur. (38) Amerciament.

Alured *and* Welby. *Trin.* 26. *Car.* II. Rot. 1573.

IN debt on Lease of Tithes, the Defendant pleaded nil in tenementis, the Plaintiff shews he had fee, & hoc petit, for & hoc paratus; to which the Defendant demurred, sed non allocatur, for to plead the Plaintiff had but Tail is a departure, so the Plea & hoc petit good enough. (39) Trespass.

Hemsell *and* Threle. *Pasch.* 26 *Car.* II. Rot. 40.

(40) Accompt. ACcount the Defendant confesseth the charge, but alledgeth an allowance of a half peny expended; to which the Plaintiff demurs, which by Mr. Solicitor is ill, and he should pray Judgment de residuo, to which the Court inclined. 2. The declaration is against Receptor of Goods, which should be as Baily. Offly for the Plaintiff, that receiver ad Merchandizandum, 2 R. 2. Account 45 & 47 & 1 Roll. 125. (15) & 21 Car. 2. Williams and Loe in Guildhall Ruled good on the like declaration. Sed adjornatur.

Robets *and* Reeve. *Trin.* 26 *Car.* II. Rot. 1102.

(41) Bail. IN a Scire Facias against Bail; on Judgment in B. R. the Defendant pleaded Judgment is not affirmed prout patet by Record in Exchequer-Chamber; the Plaintiff replies that Judgment was affirmed and remitted in B. R. pro ut patet by Record in B. R. Judgment if the Defendant shall be admitted to say the Judgment in the Exchequer is not affirmed, &c. to which the Defendant demurred, and this being a sufficient Estopple. Judgment for the Plaintiff. Nisi.

Cutler *and* Crefwick. *Tuesday*, November 10.

(42) Leet. IN debt for Amerciament in the Court Leet, for not appearing on affeerment to 40 s. to which the Defendant demurred, because its said the Leet was granted by King James, and that the Defendant is a Tenant and holds by suit and service, which is impossible that a tenure can be created since that time. 2. Its said Virtute Cujus concessionis, he was seised of the Leet in his demean, as of fee. 3. The Amerciant is but by Jury of seven, which per Curiam is ill, and must be 12. Also 4. its said afferatum, not said by

by whom, nor ad eandem Curiam, which per Curiam, also is ill. And Judgment for the Defendant.

Leech *and* Beer.

IN Covenant with the Plaintiff, to pay to the Defendants Wife or such as she appoints 50 l. per Annum, as a separate maintenance, provided she live at such a place as Naylor and W. appointed, the Defendant pleads she did not live at such a place as N. and W. appointed, the Plaintiff replies that she was always ready to live at any such place, but that N. and W. appointed no place; to which the Defendant demurred as being condition precedent: But the Plaintiff Insisted it was condition subsequent and so become impossible, one being since dead, and no place appointed, & per Curiam, the Defendant should say she lived at such a place, and that no other was appointed or approved, for this is a conditon subsequent, the Covenant being in pursuance of former absolute agreement to pay so much; and its like assent of the Husband, which is intended till contrary appear. (43) Bar. and Fem.

Garret *and* Baskervil.

IN action qui tam, on 14 Car. 2 cap. 33. §. 3. for printing anothers Copy without his Licence, the Defendant pleads that the Information was not sworn unto; to which the Plaintiff demurred, & per Curiam its no Plea notwithstanding 1 Cr. 316. pl. 379. for though no Penalty is laid on the Officer if he refuse to receive it, yet the party may be Indicted that doth it, but cannot plead it in Bar; and so it hath been often ruled; but the parties agreed to plead in Chief, and Respond. Ouster awarded. (44) Books.

Dominus Rex and Ellis. *Wednesday*, November. 11. Ante.

TWisden Justice said this plea is of 31 Eliz. cap. which was nothing to the Case reported by Dyer 122. which was only on 8 H. 6. 9. and restitution is never awarded after pleading three years possession by that Statute, but he conceived this case not within the Statute, being upon a (45) Force.

Recovery and ſeiſin by the Sheriff; and Stiles Simons Caſe 22 Car. 1. the deteiner need not be ſaid vi & armis, for then it would amount to forcible entry; and reſtitution awarded, Niſi.

Aſton *againſt* Lyder *and* Sadler.

(46) Foreſt.

IN Ejectment of Lodge, Chaſe and Warren, of a Leaſe of the Lord Buckhurſt; the Defendant confeſt Ouſter of Lodge and Chace and Warren, but of no ſoil more than of the Lodge; the Plaintiffs Evidence was by grant of the Mannor excepting the Chace, which 1 Inſt. 5. was ſaid to include the ſoil. And 2. that a Chace doth neceſſarily include a Warren. 3. The Defendant excepted that they had been in poſſeſſion above 20 years, and ſo the Plaintiffs Entry not Congeable: But by Twiſden 32 H. 8. cap. 2. §. 3. extends not to a Common, and there is the ſame reaſon of a Franchiſe and this, and whether Ejectment lyeth of theſe liberties 1 Cr. 492. pl. 571. was ſaved to be found ſpecially. 4. The Reverſion in the King would priviledge the Leſſor of the Plaintiff, being but a Leſſee for 99 years, againſt ſuch want of Poſſeſſion, but in this caſe the Reverſion was granted out of the Crown, and if it were not, the Defendant juſtified that Entry of the diſſeiſor will turn the Leſſees poſſeſſion to a right, though it hurt not the Kings Reverſion. 5. The original grant from the Crown was of the Mannor (excepting the Chace) with all Warrens, which the Defendant ſaid was a Deer Chace, but it appearing the Warren in queſtion was of leſſer extent than the Chace, and ſo the grant of Reverſion by the Crown, which is particular of the Chace or Warren of Conies, excepting the Chace generally, is intended for Deer, and cannot be of the Warren, unleſs the Warren were larger than the Chace, then it might be good, for Warren is not within the Chace. And Manwood 121. The Warren and Chace may be diſtinct liberties in the ſame ſoil in the Crown, though generally one be included of the other, and found that the King was ſeiſed of the Mannor and Chace and Warren therein, but the Court would not permit to find actual Ouſter of the Leſſees of the King, but only that the Defendant hath been and is poſſeſſed, becauſe they were nominal truſtees for Prince Henry, and were never actually in poſſeſſion, and thereby their latter aſſignments would be void.

Barnard-

Barnardiſton *and* Some. *Thurſday*, November 12.

(47) Parliament.

ACtion upon the Caſe by the Plaintiff at Common-law, he being voted by the majority of the Houſe of Commons of ſix to ſit in Parliament againſt the Defendant of 3000 l. damage, as Sheriff of Suffolk for falſe and malitious double Return of the Lord Huntingdower annext with him ſcienter, the Plaintiff was elected by the major number; on not guilty, the Plaintiffs Evidence was that before the Election the Sheriff ſaid he would declare for the Lord H. and at the Election not aſſigning Clerks in due time, and Polling after notice of Adjournment and determining the Election that night, which he promiſed to continue the next morning, and that the Plaintiff had the majority; the Defendants was that the Lord H. had the majority of Freeholders, in truth, which per Curiam is not now to be proved Error in Br. 148. but ſhould be examined on the Poll, which being now accepted, the Sheriff is Eſtopt, yet Verdict for the Plaintiff againſt Clerks Evidence by which it appeared not to be malitious, but on great adviſe and difficulty of the matter, yet without regard to this they gave 800 l. damages.

Porter *and* Bird. *Friday*, November 13.

(48) London.

IN Treſpaſs of falſe Impriſonment till 8 l. per Tun paid for Cheeſe imported into London, the Defendant Juſtified by cuſtom there &c. to receive ſuch duties of Cheeſe from all places, the Plaintiff agreed the duty from the Eaſtward coming in below Bridge, but not coming from the Weſt above Bridge, but ſo proved. And Verdict for the Plaintiff, & per Curiam, the cuſtom as to the impriſonment is void.

Walker

Walker *against the Dean and Chapter of* York.

(49) Ordinary.

BIgland prayed a Prohibition on Hub. Jones, because the Plaintiff had pleaded the Statute of limitations, 32 H. 8. cap. 2. in suit in the Spiritual Court for a Pension which was granted per Curiam, although that here is no seisin to be alledged in the Libel, but yet the Statute doth well extend to it as a suit in Election of the party to sue at Common-law, or here, and therefore as much reason to be limited there as here, and in suit in Chancery for legacy they allow to plead the Statute; and its as much reason they should do so here; and left the Defendant to demur.

Wigson *and* Gerrard. *Saturday*, November 14.

(50) Repealance.

IN Ejectment by Lessee of the Lord Leigh, of the Manor of Ilchington, who claimed as Heir at Law on revocation of a deed, by Robert Dudley Earl of Leicester, the Defendant claimed by the same settlement, 21 Eliz. for payment of debts, which was with power of revocation, to be by deed or will in the presence of witnesses with Covenant to the Feoffees to levy Fine, which is done accordingly; and afterwards another deed 24 Eliz. with new power of revocation, and a Fine thereon was levied by the same Earl, of the Lands in question, and others to the same Conusees, which by Mr. Solicitor for the Defendant, on 1 Co. 173. Digs Case, is an extinguishment of the power of revocation, which the Plaintiff said Pasch. 1653. Stiles 389. pl. Bird against the lessee of Sarah Countess of; Leicester against the Lady Anne Holborns; Verdict for the Defendant, and after of Balsall-Mannor, North against Carter 1654. Verdict for the Plaintiff, was all found specially, and by continual possession, and four Verdicts have been expounded to be only in Corroboration, and did not extinguish the Power, which the Court remembred and agreed, the Covenant being gegeneral that the said Fine mentioned, and all other Fines to be had and levied, shall be within a year to the same uses in the first Indenture, and whether it were within the year or after, or between the same persons or others, any after Fine may be averred to the same uses, on Seigni-

or

Scroggam *against* Stewardſon. *Trin.* 26 *Car.* II.

IN Treſpaſs by Infant by Gardian, the Defendant pleads that the Plaintiff was above 16 years old, and agreed for 6 d. in hand paid that the Defendant have licence to take two ounces of her Hair; to which Plaintiff demurred, & per Curiam, its no plea; for the Infant cannot licence, though ſhe may agree with the Barber to be trimmed. And Judgment for the Plaintiff. (56) Infant.

Dominus Rex and Ellis. Ante.

LEvins on Hill. 21 Car. 2. Dominus Rex and Giſley, want of vi & armis on pacifice intravit & expulit variouſly held conceive the want of vi & armis fatal; to which the Court inclined, but there being a plea of three years poſſeſſion put in on 31 H. 8. cap. per Curiam they cannot grant reſtitution, and it was denied, yet this plea may be in Infinitum on every Indictment, till Iſſue taken on the three years poſſeſſion. (57) Tryals.

Soam *againſt* Barnardiſton. *Tueſday*, November 17. Ante.

THe Sheriff prayed new tryal on the exceſs of damages, becauſe it was againſt Evidence as to the Malitioſe, ſed non allocatur, the Court having directed the Jury, that without expreſs malice they muſt find for the Defendant, though the Jury have found for the Plaintiff, which all the Court ſaid they would not have done, yet the fact is the Juries, and they Judges, and no new tryal. 2. Mr. Attorny North excepted that the action upon the caſe is new, and was never brought on a double return; but in the caſe of Nevil and Stroud, in C. B. 1658. in Richards Parliament, and Adjorned into Parliament, and thence returned into the Exchequer Chamber, though that was for a falſe return only, and 1500 l. damages being a matter that concerned the Parliaments priviledge, and no Judgment becauſe the (58) Tryals.

Sheriff died, and there it was never in the Parliament, as here it was and determined there, but the Court inclined contrary. Sed adjornatur.

Dominus Rex againſt the County of Nottingham.

(59) Ways.

IN information for not repairing a Bridge, they pleaded reparare non debet, and do not ſay who ought, for which reaſon Mr. Attorny waved the Tryal, and demured on the Caſe of Camberwell, becauſe the Iſſue ought to be that ſuch perſons (viz. Lord Lexington) ought for Bridgland to repair, and the County to be diſcharged; and its not ſufficient that Evidence ſhew that the Lord Lexington ought to repair, but it ought to be pleaded and on record, which the Court agreed, and plea was amended that the Lord Lexington who agreed to be poſſeſſor of the Lands holden by that ſervice, the ſhifting of the Tenant whereof occaſioned this plea; but the parties agreed to try it next Friday, and Verdict pro Rege againſt Lord Lexington.

Dominus Rex and Thode.

(60) Corn.

ON Outlary of Thode for Murder, it was ſuggeſted that he had Goods, &c. in London, and a Writ in nature of an inquiſition taken, which Stroud prayed might be ſet a ſide, as without precedent, and finding the Fathers Lands and Goods to be the Sons truſt, and obligation only taken in the Fathers name of Cooke, and this being taken out pending ſuit in the Exchequer, the Court ſet it aſide as a trick to prepare Evidence, though there were ſuch a Precedent in Jacobi, and the Writ warrantable enough.

Dominus Rex and Norton. *Wedneſday,* November 18.

(61) Perjury.

WWilliams aſſigned Error of Indictment of Perjury, ſaid in plea depending in the County Court held Coram, the Sheriff & ſectatoribus (not ſaid per conſuetud. between Sydebottom and Brockſham, in action upon the Caſe for 3 l. where the Defendant produced as Witneſs on a Voyr Dire as Witneſs to Iſſue thereon, ſwore he had not bought the debt,

debt, and Verdict pro Rege, that he had: The Errors assigned, Were 1. that it appears not what the Issue was, 1 Cr. 352. Sharps Case, & per Curiam, this is necessary, though the Indictment be at Common-law, and not on the Statute. 2. Its not said how the plea was depending, as by Justices and plaint entred, &c. which per Curiam ought also to be expressed, and is not aided by Verdict: Also 3. the Court should be held before the Suitors only, and not before the Sheriff and Suitors, which the Court agreed. 4. The question askt was whether he were to gain or lose by the tryal, which he said he did not, ubi revera, he had bought the debt which is no perjury, for he might have bought the debt and releast it again before the tryal, and so sware true that he gained nothing, but it should be ubi revera he did gain, having bought the debt; but where Indictment is at Common-law, perjury in Voyr dire need not be said material to the Issue, but on the Statue it must; and Judgment reversed, Nisi.

Jennings *and* Hunkin. Ante.

POlixphen on Wise and Adderly in and C.B.Crosts and Winter prayed Judgment in action upon the Case laid in Devon, and there tryed for Slander of Perjury, justified on Oath in Tremerton Court in Somersetshire, those being solemn resolutions on 16 Car. 2 cap. 8. the Oxford act that Verdict aids local justification on tryal where the action is. Mr. Solicitor opposed, because on the pleading it appears that the words are local, and the Act intended only where no place was alledged, and the matter appeared not as this would take away all Foreign pleas, and 21 Jac. cap. where Officers must be sued in their proper County would be of no effect, and tryal in the proper County where the Action is properly tryed by a Jury of the same County, though particular place of Visne be omitted; and to this Wild Justice inclined strongly. Twisden and Rainsford contra, that on 21 Jac. the Defendant may be found not guilty, or the Plaintiff nonsuited, if the action be not in the proper County, but its aided by Verdict. Sed adjornatur. (31) Visne.

Newman *and* Rivet. Ante:

(63) Courts. IN debt on Obligation in Pallace-Court averring neither of the parties were of the Kings Houshold, as they must on the new Patent; after Judgment on non est factum the Defendant Assigns for Error, that the Plaintiff was the Kings Glasier; to which the Plaintiff demurred, because by the Record the party is Estopt now to Assign that, and should have taken Issue on the Averment; which the Court agreed clearly, as on alleding cause infra that was out of Jurisdiction, this must be pleaded, and cannot be Assigned for Error; and Judgment affirmed. Nisi.

Thredneedle *and* Lineham. *Thursday*, November 19.

(64) Leases. IN Ejectment in C. B. on Lease by the Bishop of Exeter. Ellis Justice for the Plaintiff, Special Verdict find the Lands in question, a parcel of the Tenements which are excepted in the Lease, and of such a value which cannot be intended Copyhold, there being both that and Freehold in the Mannor: so here is no good Lease, and a good exception, and doth not bind the Successor; so Judgment for the Plaintiff. (Atkins) the Case is a Bishop seised of two Mannors of demeans and services, usually let joyntly under an intire Rent, Lease is made of all for three lives to John Prous, under whom Noseworthy the Defendant claims: John after two lives dead Assigns part to James Prous for 99 years, if the other life outlives: N. takes a new Lease of all that was surrendered of both the Mannors at the old Rent, and the Question is if this Lease bind the successor, and he contra to Ellis conceived it did; for though Rent cannot be apportioned, yet the whole remains on the former Lease liable to the distress. 2. Admitting the surrender good, the Lease of all, except what was not surrendred at the old Rent, as of a part of that which used to be Let, is good; for if a Bishop cannot make a Lease of part, he cannot accept a surrender of part, which comes to the same thing; but the successor shall be bound by the surrender, and consequently by the new Lease, for quantity makes all one the old Rent be it out of more or less Land, and the end of 1 Eliz. Cap. 19. is satisfied in this Lease, and the words of the Statute cannot be pursued strictly by the Letter: for so when the old Lease is gone, the old Rent

Rent is gone; but the intent was as 1 Inst. Lit. Sect. 222. on 8 H. 4. 19. grant to distrain in the residue for the same apportioned Rent is meant of the like to all material purposes: so 32 H. 8. Cap. 28. and 1 Eliz. Cap. 19. is the same in effect of the old in quantity, and the scope and aim of 1 Eliz. being pursued, the intent is 2 Inst. 107. being out of the mischief, 2 Inst. 110. and Dr. & St. 29. b. the reason of the Law and the Lease is rather to be saved than destroyed, as the life of a Man by all just helps, for the Tenant hath paid great Fine, therefore not only in Chancery Equity, but by sound Reason and Common Law, for 1 Eliz. is restrictive, therefore to be expounded favorable for him that hath the Lease, and so differs from 5 Co. 5. Mountjoyes Case, where a greater power is given than the Estate will bear, that is Stricti Juris, but 10 Co. 60. the Bishop of Salisburies Case, where the successor is not impoverisht, nor the Revenue diminisht, grants of necessity of ancient Offices, which are but of greater convenience, and therefore are not grantable for uncertain time, as at Will, which yet may be, but for life of the lessee is more convenient. So in 1 Cr. 557. Young and Fowlers Case, grant for life after a life being usually, so is good, notwithstanding 1 Eliz. yet there is is no necessity, so 1 Cr. 47. a necessary Office is within the Equity of 1 Eliz. so 1 Cr. 259. & 5. Co. 14. on 13 Eliz. Cap. 10. Cosin Germain to 1 Eliz. usurpations are restrained by Equity, and ex congruo Cases not contained in the Letter are within Equity: so Moor 107. pl. Fox and Collier, a concurrent Lease is said good on like Reason, being no prejudice to the successor to have one Lease by Estople, which is not within the words of the Statute; but now he shall have two Rents: and the opinion of a single Judg, viz. of Hutton in Latch 242. is not to be put in ballance with that resolution, and 5 Co. 5. Mounjoys Case is Law and makes not against this Case, though obiter opinions be as joyning two forms in one Demise, which is not of necessity; but saving Paper and wantonness not convenience, for the same person for the same time may have them by several Leases, and the Letting of a parcel of a Farm rendring Rent, pro rata, was not pertinent to the principal Case, but put arguendo and grounded on a special power, and not derived out of the Interest of the party, as here; and the Bishop by Confirmation of Dean and Chapter might make any Lease at Common Law which the Tenant in tail could not do, and 1 Co. the opinion of Poph. in Chudlies Case, of joyning two forms by the Tenant for life with power to make Leases is void; on the same Reason

son being on perpetuity and power to make Lease out of anothers Interest, and on condition which doth not quadrare with this Case; but in the Case at bar there may be necessity of Letting part, and this Case is as well warranted by 1 Eliz. as a Lease severally by Copaceners put by Wray, 5 Co. 5. for there is no necessity one should Lease her Land, and it may be as hard to restrain a Bishop to Let part, as of a Coparencer, but both are grounded on the Equity of 1 Eliz.

So of a Lease of parcel escheated there is as much Equity to help the Bishop on Lease of part, reserving as much proportion of Rent or more; against which 1 Cr. 94. is the only direct Case against this for Smith and Trinder, where less was Let, 1 Cr. 23. reserving a proportion of Rent was ended by Arbitrement: and 1 Inst. 44. is directly otherwise, and here is no disadvantage to the Successor to keep Hospitality; both which were the aim of 1 Eliz. Cap. and the Successor loseth nothing in Meal or Malt, but hath the same quantity, and that which is excepted in the new Lease to Nosewor-thy is not material, for the Bishop hath the full Rent of the other Tenent Chatty and his Lands since his Lease: and though he hath not so much Land now to distrain in, yet he hath what is omitted and excepted in his own hands; and its clear the Rent is to be apportioned in this Case on surrender of part, being good, and Noseworthy Tenant of the Freehold shall answer the Rent of Proud, the Chattel lessee of the Lands excepted in Noseworthys surrender; and thus the Rent is better answered than by several Leases, for demeans will better maintain Hospitality than a Rent: whence its provided that a Bishop shall not Let what was not usually Let, on 32 H. 8. Cap. 28. a Bishop may improve, but shall not impair his Land: and this parcelling is better pro bono publico, and may be better for the Bishop than great Farms, which hath been punisht: and the successor may have more Rent and better Tenants by parcels than in gross; and this agrees with the Reason of other Statutes, as quia Empt. Ter. 2. Inst. Feoffee of part shall answer pro particula illa, and the Lord must seek his Rent at Common Law. There was an apportionment on purchase of parcel, out of which Rent service issued, and the Law is fitted to the convenience of the people and their necessities, and accounts not the incertainty of value of parcels, or incertainty of Judgment, to be any inconvenience: for notwithstanding 5 Co. 5. perquisites may be valued by a medium, and so are the profits of Land, yet yield some years more, and sometime less, and the extents of Mannors are at certain value, therefore the Law will someways Judge of

of things in themselves not of certain value: the successor hath all, and with more advantage than his predecessor, and Uptown excepted are not found to be parcel of the Demeans of Tregayr, and the Demeans are above double the Rent, and nothing is eloyned, but meliorated: but if the Case were singly on the distress, perhaps his remedy being less, the Lease would be ill; but on the whole, Judgment for the Defendant. Windham for the Defendant: the Case is the Bishop seised of two Mannors of demeans, Copyhold and Free, Leaseth all to Prouse for three lives, on the old Rent 67 l. 1 s. 5 d. After Prouse grants the demeans of one Mannor, after death of two, to J. Rouse the Brother for 99 years, if the last life live; the first lessee grants to Noseworthy, who surrenders to the successor the Bishop all but what was granted for years to Prouse the Brother, and takes a new Lease for three lives of both the Mannors at 76 l. 1 s. 5 d. &c. except the Lands of Prouse the lessee for years after another Bishop is made, and the third life dieth: and whether this new Lease bind the successor was the question; and he conceived it is a good Lease, this being of general concern to all Ecclesiastical Persons, and their Tenants; were there any visible prejudice by impairing the Bishop, he would not thus hold; but being for his benefit though it doth not Quadrare in words, being a restrictive Statute, and not enabling, the Lease is good, for the Bishops power is at Common Law, and only restrained in acquisition before marriage, and diminution since the Lease by the Bishops Tenant Prouse to his Brother of part doth no ways affect the Bishop; but if the whole had been surrendred, the new Lease of part might not be good; but on surrender of part to the Bishop, the lessee of the residue shall pay his proportion of Rent: and here the Bishop hath the whole Rent on the new Lease, and hath the Tenements in Lease for years in possession, and had the proportion of Rent during the life then in being: That which must avoid the Lease must be on 1 Eliz. Cap. being a good Lease at Common Law by the Confirmation: and on 1 Eliz. Cap. there are no words as in 32 H. 8. Cap. 28. that it should be of the Lands usually demised, and that here is not so full a distress as may be in the whole, is not sufficient to make it void; for making all the Tenements into one may be of great inconvenience to find a Tenant able to deal for his whole Revenue: therefore turning many Farms to one is as inconvenient as this, and 1 Cr. 94. there is no certain Rent: and so being no certain Rent found, the Court could not for one Mannor Judg what was the accustomed Rent; but

here

here the certain Rent is found, and 2 Cr. 458. a lease would be void for want of such an exception; or if more be granted than was anciently, its void, as of ancient Offices with addition of Fees: for as two Acres may be added, there may be 200, or many Mannors, out of which no ancient Rent was reserved: and though 1 Eliz. be a private Statute, yet its of larger extent than 5 Co. 5. which was but for a private Family; and here the question was not on lease for 21, but on lease of 300 years, so suits not with this Case; also as to the addition of Lands not demised, the lease was held void, but the Rules obiter will not guide the Case in question, and had part been evicted, all could not be let: and its not reasonable to say that therefore he should lease none. So on drowning part by Sea, or the Bishops recovering part in an Action of waste; and had the Bishop for livelihood reserved an Acre for a Garden, it would not follow he must take it back in Trust, and that of necessity he must demise all, but demise of the rest is good enough, the exception being supposed for the Bishops benefit, the demise of the rest is not void; for if as 1 Co. 44. on 32 H. 6. he may let severally, a Fortiori here on 1 Eliz. where the whole Rent is reserved, which is the self-same in quantity, yet its not void as Ellis said; but had the Rent been reserved only out of part, it would be void; but a reservation of part of Rent, where only part is surrendred, is well enough, for he cannot have and eat his Cake, and here the Bishop hath either the Land as of Uptown, and the Lands excepted, or he hath a proportionable Rent out of the rest, according to the old lease: and 1 Eliz. hath been extended by Equity, as in the Dean and Chapters of Worcesters Case, where the later lease had not the same qualities as the former, for that was a customary Rent before, when Copyhold, and now on lease for years reserved, as at Common Law; for the former he might enter, not so for the later; yet by this it appears so the Rent be ancient, no matter for circumstances; and the Cases of concurrent leases, 1 Anders. 65. was held clearly good, yet the Statute intended leases in Interest, yet because it exceeded not 21 years, and the Rent was continued, there was no prejudice, but possibly an advantage by gaining Rent overplus of the lessee by Estopple, and upon the grounds of Convenience are the grants of Offices held good, and many leases of great value have exceptions and divisions of Rent, which are not now to be shaken by querks of Bishops Agents, and its strongly implied these Lands are no parcel of the demeans of D. which is found of such a value, consisting of Demeans

means and Tenements devisable by Copy and free Rents, and the exception is of two Tenements, a parcel of the Manor which may be Copyhold; for its not proper to say Tenements are parcel of demeans, but such Tenements as are devised by Copy, there being no other; and consequently the means of distress which extends not to the Copyhold is not restrained: Recitals or Implication of things collateral found in special Verdict is not sufficient for Judgment, therefore modo parcel may be Ages ago, and not sufficient, and to intend these take up all the Rent, is contra to the Verdict that finds the Rent sufficient; and its a Foreign intendment to think Men will take a lease of Land at greater Rent than its worth, much more to pay 900 l. for it; and the reservation of more Rent than the Land is worth, is not void, and yet the Successor can only have what the Land is worth: and though Lands may fall, yet not by intendment: if the proportions of Rent were equal when the lease is made, the increase or decrease of part after will not make the lease void, but would so Fetter the Bishop that neither he could make, nor Tenant take lease without Counsel at hand, this hardship would impose on the Tenant and Bishop. 4. Vaughan Chief Justice on Friday, Nov. 20. for the Plaintiff, as Ellis quite through the Case, which is no more but the Bishop seised of two Manors, demised them intire, excepting the demeans of one intire, reserving the whole Rent: and whether this be a good demise is the question, and 1. Its no good lease. 2. When Noseworthy surrendred and took back a new lease of both, when there was a lease for 99 years depending on life of Chattee then alive, being not determined, its no good lease: on 1 Eliz. 19. although it be not to be taken literally, as hath been objected, yet the Successor is disadvantaged, and the Statute was not intended for the Successors benefit, otherwise than by the particular ways and means of the Statute, from which particularity we cannot recede without repealing the provisions therein, though they do not answer the end of the Statute, and being not Repealed they do remain; and then if they be receded from, there is an Act of Parliament of bare intendment without Act, which is not conceivable; had the Law-makers intended the Successors should be indemnied, they needed say only, that all Acts to the Successors disadvantage should be void, and so left it to the Judges: the consequence of which had engaged every Successor to dispute every Act of his Predecessor, whether hurtful or not; and its no easie thing to resolve what Acts of the Predecessor will be detrimental to the Successor; whence the Parliament

hath trusted none to deliberate, but have set out what they supposed to be disadvantagious; the Judges are not to Judg what Acts are hurtful to Successors, that is only in the Law-makers; but Judges interpret only what is prejudice, as crossing the provisions of the Law made; and one of the particulers Enacted by 1 Eliz. 19. is, that the Predecessor is restrained from making leases other than for 21 years, or three lives, reserving the old Rent, which was not because the Successor might not be better provided for, if the Predecessor could lease only for one or two lives: nor is it any consequence as hath been insisted on, that because the Successor is not hurt, therefore we may recede from the words of the Law, and there is no difference to make a lease warranted, not good; or a lease not warranted, good for the benefit of the Successor, the later especially, being absolutely restrained: and upon the first provision 25 Eliz. Moor 107 pl. 251. the Judges have made a great strain upon this Statute, that a concurrent lease might be made where 21 years is spent to 4 or more years, that the later lease should run on with the former, and be good for the residue of the years: Its 1 Andr. 107. Fox and Colliers Case, which they that resolved, took to be within the Letter and intent of the Statute; but the lease in question is not within the Letter; in that Case there was no lease for 21 years in being, and the Successor hath greater benefit by the Estopple; and yet notwithstanding that Book which was by Dyer, Mead and Plowden denied to be Law in that time, its not within the Letter nor intent of the Statute, Latch. 241. because here are other leases than for 21 years, or three lives, and the Statute intended when a lease was once made, that on expiration the advantage should be to that Bishop in whose time it expired; and by this means there will be always a concurrent lease in being, and the Successor can never make an intire lease: and though in pleading Men be Estopt to say, the party that made the later lease had no power, yet this being found by Verdict the Judges might Judg according to truth; also the Executors of the lessee are not bound by this Estopple while the other lease first made lasts, and if so, this lease is not for the Successors advantage, and so only good to some purposes: viz. on pleading. The second Provision of 1 Eliz. 19. is that on all leases the old Rent or more shall be reserved, which is not meant only of the old sum of Mony, but issuing out of the old Land, neither out of more, as 5 Co. 5. Montjoyes Case, nor out of the less, a Fortiori, but the lease in question is confest to be out of the less by near 300 Acres; though it be the same sum, so it cannot

cannot possibly be the old Rent, for if it be once admitted, the old Rent may be reserved out of less Land, it may be reserved out of one Acre, or any part of the Land: the consequence whereof is, that the old Rent out of 1000 Acres may Issue out of one, which on consideration will make any blush to hold that opinion, for there is no stint nor repagulum, therefore the old sum and the old Land must be preserved as the Boundary; and for Judges to determin other leases good because of no disadvantage to the Successor, is an ill interpretation; as where ancient Rent and more is reserved by Deed Poll, yet this hath been adjudged void 1000 times: So of a lease from day of Date, and not from making, its void, because these punctilios be not observed, which are less necessary than the old Rent and Lands; and it will not be material that there is Land sufficient left to answer the Rent: for the meaning of the Statute was to secure the Rent against all possibility visible of incertainty; and the more Land, the surer is the Successor of the Rent: else the Predecessor excepts at his pleasure, but reserves the old sum, The Issue whereof is that the Bishop may lease the Land at a great Fine and small Rent; and if the Lands excepted be the greatest part, the consequence thereof is, that the Successor shall have only the Rent left; which is an elusion of the Statute. So if, as in the Case in question, the Bishop doth not demise the Land excepted, yet he hath till the Lands excepted come out of lease, but a slender provision, and it may be not answerable for the Rent; and though it were sufficient to answer the Rent at the time of the lease, yet Lands rise and fall, and therefore the Rent becomes wackt and disturbed by every accident; against which the Statute provided that it should be the old Land: and we have experience of the fall of Land; therefore to suppose this, is no more than to suppose the Sun shines. Also part of the Mannor of Burmere is excepted, and then the Successor hath no remedy for his Rent, if all the Demeans be excepted: and though it doth not appear expressly its Demean Land, yet nothing appears to the contrary that it is not Demean Lands; the values of both Demeans are found, but its not found the Demeans of B. are least to Noseworthy, therefore they may as well be excepted as the other of Tregore, for they are not presumed to pass with the Mannor, because of the exception, and there is nothing in finding the value of the Demeans at the time of the lease to N. for another Jury may find any other value; so this concludes nothing: And this variance being contrary to the provision of 1 Eliz. 19. is void. 3. By

this invention of old Rent out of less Land, these leases will be in Diametrical opposition to the leases of the Statute which secured the old Rent, and now only the new Rent will be secured, so there will be much Land to secure the less Rent, and none to secure the greater; so its against the Statute. But if an old Rent of 100 l. Issue out of a Farm, it may be divided pro rata, as Ellis agreed; yet this is denied by all the Court in 5 Co. 5. Mountjoyes Case, on 1 Inst. 44. because this is in effect the old Rent, and else great mischief may follow by throwing up great Farms, as now, unless the Bishop thus divide he might be forced to keep all the Land in his hand, which would be inconvenient; for though what as a Seat the Bishop occupies himself, be best for Hospitality, yet keeping Lands in several Counties in his hands would be far from that, and rather begger him; and this apportionment is the old Rent in consequence and effect: but it doth not therefore follow that if part only be let for the whole Rent, and part retained, that this is pro rata, nor is it any Logick: and in the Case in question the lease for 99 years was in being when the new lease for new lives was taken by Noseworthy, therefore on 1 Inst. 44. this is void: and if a Bishop have Land-rent 40 l. old, and other Lands of 160 l. demise both, reserving 240 l. this is more Rent by 40 l. yet held void by 1 Eliz. because though both the old Rents be reserved, yet being reserved each out of more Lands than they ought to do, 5 Co. 5. this were sufficient to make the lease in question void: and Smith and Prin 1 Cr. 23. is so. And though this Case be only obiter denied in Mountjoyes Case, yet if this had been Law it had over-ruled the principal Case, and therefore though not the Case in terminis, it did tantamount; also though this reservation seem not prejudicial to the Successor by the joyning Farms together, yet it is a prejudice to the publick, and so resolved in the Star-Chamber, on Information by Noy for engrossing Farms, and the Successor is a part of the Publick: and 1 Cr. 95. is the same Case as ours, though the report be obscure, Three Mannors intirely used to be demised at 30 l. the Bishop demises them at the old accustomed Rent, without particular expressing it, which had been good enough, it appearing what the old Rent was; but being with an exception out of one of the Mannors, it was held not good by the Statute, 1 Eliz. because its now impossible there can be any old Rent, by reason of the exception of one Acre; which is punctually agreeing with the Case in question: But if the old Rent were in Gold, the new in Silver; or 20 l. out of one part, and 20 l. out

out of another or several Rents of equal value on demise reserving proportionable Rent, are not good. 4. As to the objection that 1 Eliz. 19. is to be taken by Equity, because its impossible the Letter can be pursued, which is mistaken, as in usual speech Men keep their old Diet, Customs, &c. which is not intended what was Eaten many years before, but is meant of similitude, for what manners or fashion is past is impossible, and where any Law is impossible, its no Law, and there can be no Equity of an impossible Law which is none. Also upon the Statute, W. 1. Cap. 4. of Wreck which is to be preserved for a year and a day, which is not intended of perishable Goods, which its impossible to preserve for a month or a day, therefore preservation is secundum subjectam materiam, of what may be preserved: the Equity of a Law, as Pl. Com. 464. in Eilton and Strouds Case, is to be consulted by asking what the Law-makers intended to be compriſed in the Law, which must be of things possible, and then if it be made within the intent, it may be within the equity; and here the Law-makers never intended that no old Rent strictly taking should be reserved: A Law, that a Man shall grow a Foot higher, is no Law, but impossible. 2. As to the difference between 1 Eliz. and 32 H. 8. Cap. 28. before which the Tenant in tail could make no lease, but the Bishops could, before 1 Eliz. but not alone, but by Confirmation of Dean and Chapter, but since 32 H. 8. Cap. the Bishop may make a lease alone, and neither the one nor the other Statute give power to make a lease, if the old Rent be not reserved, which is the only question not their power to lease 10 Co. Eveſque Sarum: and 1 Cr. Young and Stone, and Lamb and Walker, all which Cases concern the Bishop in Offices, and in all resolved that the Bishop may demise necessary Offices, provided he charge the Successor with no new fee, if the demise be as is necessary, only for one life; yet these Cases are not applicable to, or if they be, make more for the question, for old Offices are not demisable, and new Offices the Dean and Chapter must Confirm. Register is not demisable, because no old Rent can be reserved; the consequence whereof is that the Bishop can grant nothing, though it do not hurt his Successor, if he cannot reserve an old Rent: and these Cases will never prove that where the Successor is not hurt the Bishop may grant for 21 years, or three lives, without the old Rent. 4. The Case put by Wray, 5 Co. 5. where the Successor had the intire old Rent, was held void, because Hospitality was diminisht; whence if the Bishop reserved less Rent it would be void; or if the whole

whole Rent be reserved, it may be remitted by Predecessor, which would decay his hospitality as much as the other: also the Bishop may Fine for the Surplus of Rent in his own time, which would be as good for hospitality; but the true reason that the lease is void, is because its not the ancient Rent. 5. The objection that on eviction of part, its impossible to reserve the old Rent, or that the old Land be swallowed by the Sea, these are things impossible, and so not required by this Law, but that part of the land that is so evicted must remain in the Bishops own hand undemised, as such as were never before demised. Also its admitted by us all, that where old Rent is devided pro rata with the land, its good, and though one part of the Land be evict, the other part may be least again pro rata. 6. That there are many leases that except part of the old land, is no more reason than that any void lease should be Judged void, because it would be determinent to Tenants, nothing avails any, but it hurts some, and whatsoever Rent is reserved since the Statute, that is not the old Rent, no Process of time can make it the old Rent, for this must be such before 1 Eliz. wherefore lease made to the Plaintiff by the Bishop is good, because the Bishops Entry was Congeable, but rather than there shall be failer of Justice, I will go over to the Defendant if they come not over to me. Atkins and Windham persisted, so Ellis, and said this will not be settled till Exchequer-Chamber end it, and so Adjornatur, and 8 December, after Vaughan died, and North Attorny General succeded.

(65) Tenants in Common.

NOta, Ex relatione Shouldham, this day in Chancery it was said by the Lord Keeper Finch, that devise to two equally was intended to be divided and makes Tenants in Common, and was so adjudged on Bill of review after Decree, and Judgment at Law, that they were Joynt-tenants, and this done by the advise of most of the Judges. See Stiles. 211. pl. 477. and devise Br. 38. 5. Devise.

Hansty *against* Sanders. In Error Br. 173.
Saturday, November 21.

(66) Baron & Fem.

LEvins prayed Feme-covert, the Defendant in execution might be discharged on Affidavit, that at the time of the Bond, which she entred as Feme-sole, and Judgment thereon as sole, that she was a Feme-covert, sed non allocatur, this

this being for Rent of a House taken by her as sole, but by Wild in Worsleys case, 16. or 17 Car. 1. a Feme-covert brought a Writ of Error to reverse a Fine, held good in the Husbands name, and that he cannot release, nor the Defendant plead release of Error: But Twisden said the Fine was not reversed, and in Lady Prettymans case, the Court did not determin it by Affidavit.

Dominus Rex and Jennings.

(67) Bastard.

MEdlicot excepted to order of Sessions in Berks, for keeping a Bastard begot on one Rowland, because its to pay 2 s. 6 d. per Week, not said how long, which is ill, but mistaken, being so long as the Child is chargable. 2. It appears not that the child was born in the parish where its said chargeable, viz. Hartwell, but because the child cannot be chargeable to any other parish than where born, and it doth not appear it was born in any other parish, so its well enough. 3. Its said by two Justices of Peace next to the parish, and not said next to the Parish-Church, and this being but a particular Power given to the Justices of Peace, it must be precisely pursued: and Wild Justice said several orders have been quasht for this exception, but contrary by Twisden and Rainsford, the Parish and Parish-Church is all one by Intendment. 4. There is no order to give Bond, and this order being confirmed the following Sessions on appeal, there is now no remedy on the Bond, sed non allocatur, for the Satute 4 Car. 1. cap. is, that they shall commit the party unless he give Bond, so they should have committed him. 5. It was prayed to quash all latter orders, after the confirmaion on the Appeal, & per Curiam, on 1 Cr. Pridiance Case, this must be done as to affirmance or disallowance, but not orders that are to enforce payment, they are good, and the orders first made were confirmed per Curiam.

Bishop *against*.

(68) Tythes.

EX Motione Hed to change a Venue in action upon the Case, for suing for Tythes of Hops, contrary to Modus of 2 s. per pound in the Wild of Sussex, layd in Middlesex, the Court conceived this action would not lie, though falso & malitiose & scienter, &c. the Court refused it because of

of partiallity in the County of Suſſex, Kent, &c. but at laſt altered it to Eſſex.

Johnſon *and* Tichborn.

(69) Dower. ERror of Judgment in Dower. 1. Becauſe the ſummonors on the original, and the Ueyors on the grand Cape were the ſame perſons. And 2. that there was more damages than due; to which the Defendant in Error demurred for doubleneſs, one being Error in Fact, the other in Law, but by Mr. Solicitor this is not double, becauſe both may be examined, one Per pais, the other by Affidavits in Court; but it appearing the damages were more than the value of the Land on the Record, theſe are different tryals, and ſo the Plea is double, as ſeveral facts are, but twenty matters in Law are not double. But 2. theſe two Errors are aſſigned in the ſeveral Judgments, and each may be reverſed alone, as Co. Metcalfs Caſe, though Error of the Principal overthrows all: Alſo if the latter be adjudged none, it will be all one as if no aſſignment; but per Curiam, if the firſt be adjudged Error the reſt falls, and that being fact its double; and Judgment affirmed, Niſi.

Duke of Albemarle *and* Keneday.

(70) Infant. ERror of Judgment in Ireland in Ejectment, was aſſigned that the Plaintiff then Defendant was per Attornatum, and within age, and found within age, yet being ſaid that 17 Car. 2. cap. 8. was enacted in Ireland and per Attronatum for per Gardianum, aided thereby as of like matter, being not againſt the right of the cauſe; and the Court ought to take notice of general Laws there, and ſo of all the Laws of King James's time, made Laws of Ireland in Straffords Lieutenancy: but by Wild Juſtice, this is no matter of like nature with what is mentioned, being only the defaults of Clerks, and this Court cannot mend it as the Statute requires, and its not ſaid the Judgment ſhall be good, notwithſtanding which the Court agreed; and Judgment reverſed, though general Laws there ſhall be taken notice of here.

Binrom

Binrom *and* Leigh.

ERror of Common recovery suffered by Wanly Tenant in Tail, for want of Writ of Entry: Symson prayed a reversal by consent of the demandant Tenant, and W. the Vouchee, to whose use it was in Fee, which the Court suspected as a Collusion to avoid debts or leases made by W. yet Tenant in Tail since the recovery, and there was a Writ of Entry in Bagnalls hands that sued out the recovery, but C. B. will not force the filing of it, as it was resolved in the Lady Baltinglass Case: but to affirm a recovery, they will, if there be a Writ, force the filing of it, and therefore on reading the deed of uses, it was reversed, Nisi. (71) Recovery.

Kelsy *and* Grene. *Monday*, November 23. Ante.

SAnders prayed Judgment on Trespass in Easter-Term, Continuando to a day 3 June which was after, which being a movable Term, the Court cannot take notice of the day; the Court agreed that Trespass in the Term may be sued the same Term, and the Court will examine the time of the Bail, and if this were after the Trespass its sufficient: But per Curiam the Court at discretion may by Almanacks examin whether the day be after the Term, and do it as well in arrest of Judgment as on Error to prevent Error, and though it doth not appear when the Term began or ended, yet the Continuando being to day after the Term ends. Judgment staied. (72) Days.

Walker *and* Wilson.

IN Trespass of Entry and consuming Herbam and bladam, growing the Defendant justied as to Herbam for Common after Corn cut till relown, quæ est eadem, saying nothing as to bladam, which by Levins is well enough, being said of Corn growing, and the not Guilty from the time of the Corn being cut till the relowing; and he prayed Judgment: But per Curiam, it should be from the time of Corn sown till cut, and Judgment stayed. (73) Trespass.

Hoddard *againſt the Biſhop of* Exceſter.

(74) Church. SErjeant Jones in C. B. prayed Prohibition on preſentment for abſence four Sabbath days, not ſaid when, ſuggeſting that he is a Freeman and ought to be charged certainly, and that by cuſtom he ought not to come to Church on the Saturday, the Court conceived the Sabbath day as in Common parlance is all one with Sunday; as in the Liturgy its recited. 2. The matter of not coming to Church being in their Conuſance, the party may appeal for the uncertainty of the preſentment, and if it were before pardon it muſt be pleaded, by Vaughan Cheif Juſtice: But Prohibition granted per Curiam, præter him, as uncertain.

Hillar *and* Hill. *Tueſday*, November 24.

(75) Fees. IN debt on Conceſſit Solvere in Briſtow by the Plaintiff for fees, as Attorny of B. R. the Defendant demurred on the Evidence, and the Steward there over-ruled it, that it did lie there for fees here; which though againſt Law, yet is only Error and no cauſe to ſet it aſide as void; and though the Plaintiff brought action upon the Caſe, upon that recovery againſt the Bail, yet this is no multiplication of ſuit, the mony being not paid; and the Court diſcharged rule to attend, Ex motione Mr. Solicitor, and report by Secundary on reference.

Muſgrave *and* Woodhouſe.

(76) Slander. IN action upon the Caſe on ſlander of Attorny, Error was aſſigned on Judgment in C. B. becauſe the Kings duty was not paid, as 22 & 23 Car. 2. cap. 9. §. 180. on the Declaration. And 2. that there was no Hab. Corpus, ſed non allocatur; Judgment affirmed.

Burdet

Barnard *and* Ree.

IN debt on Obligation to perform Charter-party to pay so much per Dolium: Breach is assigned for the Defendants non-payment for so many Doles and three Hogsheads, which by Wild Justice is ill, the condition being not to pay secundum ratum, as in the Case of Needler and Gesse 1659. of the Quier of Paper, so much per Quier, which the rest agreed. Sed adjornatur. (82) Condition.

Orpwood *against* Holden.

POlixphen prayed full cost in Trespass of taking two Sheep where no freehold was in question; the Defendant justified specially; yet per Curiam this is out of the Statute 22 Car. 2. cap. because no title can come in question. 2. This was originally below, and removed hither by Habeas Corpus, which in C. B. Hillary-Term last was ruled not to be within the Statute, but in this the Court differed; but Judgment and full Costs for the Plaintiff on the first. (83) Costs.

Barnardiston *and* Soam. Ante.

MR. Attorney North excepted in arrest of Judgment, that the Action is not maintainable, being at Common-law, and not on 23 H. 6. cap. 15. the ordinary returns on Process are conclusive to parties, but here it is not, for the Commons every day rectifie the returns by Petitions. 2. In those returns Sheriffs in doubt may take the parties security which would here be the greatest crime, as in Brunker; Dyer 168. pl. in the Starchamber. 3. Those returns are within the jurisdiction of the Court to whom the return is; and the Court as in the Bankers Case, Examined Non est inventus against persons every day present. 4. There only the right of the party is concerned, ; but here the publick Government. 2. The Statute 23 H. 6. is introductive of a new Law, there being no convenient remedy, as by action upon the Case might before. 3. Action upon the case will not lie against the Sheriff being a Judge, as 12 Co. 24. though it be scienter, falso, or ea Intentione, and that found by Verdict, because Judges ought to be free of all apprehensions of fear of parties, one of which they must displease, and the determining the election is matter of difficult Judgment as of the value and title of Freehold, and fraud and residence, and in (84) Return.

in these questions the Committee of priviledge often determin one way, and the House another. 13 & 14 Car. 2. Hill. Rot. 1884. Mr. Lechmores case resolved that the Sheriff in the County Court is the sole Judge in election of Knights, and may Amerce the Suitors: and the Writ is in nature of a special Commission, and the difficulty is as great in them as in any Judge, by reason of Crowds and interest. 4. The Sheriff is no Officer to the Courts of Justice, but immediatly to the Parliament and the King, and its the opinion of the Commons that the Chancery cannot Issue forth new Writs for election without letter from the Speaker, nor can they meddle with returns, but only the Parliament; and if the Sheriff be exposed he will provide for his own security rather than regard the publick; and by the course of Parliament if J. S. be returned chosen on Petition of J. D. the Parliament bring the Sheriff in and make him amend his return, and so upon a double return the Sheriff is made to take one off, which is done to secure the Sheriff against any Action upon the Case at Common-law, else the Sheriff could be safe, hence in difficulties the Sheriff is indulged to return double, and they punish the Sheriff on partiality, and there is no damage to the party, for when the right is determined, its ab initio for his wages. 5. In this action the right of election comes in question, and the Gist of the action lieth upon it. 6. Such an action as this never prevailed before, though in all times there hath been occasion for it, and the Statute takes notice of it: And Nevill and Strouds Case, is not confirmed by Act of judicial proceedings, there being no Judgment; but adjorned into Parliament for difficulty relating to matters and priviledge of Parliament. 3. The false, &c. will not make that action maintainable where the matter will not support it: as 2 Co. Action upon the Case lieth not against the Lord for not admitting Copiholder, so Madisons against Skipwith, Action upon the Case for killing Sir Francis Worsly on purpose to determin his Annuity, which though false would not lie, and so in the Case of Stiles Cave and Goulding, and he relied on the Case of a Judge. Maynard for the Plaintiff, party hath loss and the publick hath prejudice, and here is falshood in the Sheriff; the wages is but from time of attendance, and by this means the Sheriffs may keep the Parliament empty of Knigts, as the Mayor may of Burgesses, and this equivocation is worse than a lie: Also publick Nusance as Damage to the party is accionable, and here the party is kept from sitting: Also the not being conclusive, is a greater charge, and so more actionable; the Statute only

only saith there was no convenient remedy, not that there was none; and by Mr. Solicitor this Case would not have come within the Statute 23 H. 6. because the Plaintiff was returned, and it appears by the Record the Plaintiff was chosen by Majority; and no difficulty appears but that the double return was made purposely to put the Plaintiff to charge, and so the Action lies whether false or not, and many Statutes give penalties for wrongs, for which notwithstanding an action lay at Common-law, (as on escape.) 2. The Sheriff is no more a Judge than he that tells the voices at the Commons door, or on elections in Guildhall; and his examination makes him not a Judge, and an action will lie here for false return into any Court, and the right of the election is not in question, but already determined with the Plaintiff in Parliament, and Nevills Case was for not returning him who was one of the five then allowed, and two were returned according to the ancient number: also the matter never having been in Parliament, therefore was not properly begun in Westminsterhall, but in this Case the Parliament hath determined the matter, and the Verdict is an affirmance of that determination. Lastly, as in Co. Slades Case, if the action be agreable to the rules of law and no rule against it, the action is now well enough brought, though never any were brought before. It was farther urged by Offly for the Plaintiff, that 5 Rich. 2. cap. 4. gives an Amerciament of Sheriff as accustomed, and in 12 Ed. 2. in the Tower, in which Roll there are no Membrana. Matthew de Grantham elected Knight for Cornwall, Petitioned against the Sheriff for returning one Reading; and the answer by the Commons to that Petition, is that the Sheriff be arrested to answer that matter. 7 H. 4. cap. 15. establisheth the form of Elections without other remedy than at Common-law. 2. The Sheriff is no Judge where he is to make any return, as Elegit. 1 Roll. 738. Lister and Bromly, and in Parliament the Clerk of the Crown brings in the return out of Chancery and carries it back, though amendment be in presence of the Sheriff, so 14 Ed. 4. 1. 3. The Satute 23 H. 6. is an affirmative law, so takes away no remedy that was at Common-law, and the Statute 1 H. 8. cap. 8. & 3. H. 8. cap. 2. is with penalty against the Escheator, yet 4 Inst. 226. and 1 Roll. 92. 5. 4. action upon the case lieth against him for false Office, and in debt upon 23 H. 6. if Issue be that he was not duely elected, the right of the Election may come in question, and so Rast. Entr. 411. In Trespass for Distress made for Wages of Knight of Parliament

liament, 38 H. 6. Numb. 35. gives a general indemnity to Sheriffs, which shews there are misdemeanors, to which they are liable at Common-law, beside upon the Statue. 4. That this Court hath no Jurisdiction of the principal is not material, for this Court hath no Jurisdiction of Incontinence, yet by a consequential damage, such slanders are liable to action upon the Case here, so 1 Roll. 93. & 1 Cr. 291 the same of Adultry, 1 Roll. 112. and as for Nevills Case, which was Hill. 1658. that was on false returning another without laying any particular damage, but dishonour, and Verdict found 1500 l. but here is a particular damage laid in the Declaration, which is tryable by Jury, and that case were carried up by the Chief Justice into Parliament, yet it was by them sent into the Exchequer-Chamber, and there fell by dissolution of Richards Government, and after by death of Stroud the Sheriff. Sir William Scrogs for the Plaintiff, whether the Sheriff may make a double return or not, is a question meerly Parliamentary, and if the voices were equal, the Sheriff may make a double return as a Judge, and he hath more to do than tell voices to Judge whether Infant non-resident, when a Writ is read or he that comes in while the Poll is taking shall give any voic, and these every day make the difficulty in Parliament Pl. Com. [illegible] in Bucklies Case he is said a Judge, and if he be none, then I except. 1. That its said at the County Court held before the Sheriff and Suitors, is ill, and should be before the Suitors only, as Ante. And 2. The returning of Lord Huntingdower is said to be by other persons as majority of Freeholders, which is affirmative, and so the return of the Plaintiff is single. Twisden Justice said this was no more a judicial act than the election of a Crowner, in which case the Sheriff must examin the qualification of the person, & Curia advisare vult; yet per Curiam, Judgment can be only of that Term in which its given, and cannot relate tunc pro nunc.

Walker *against the Dean and Chapter of* York.
Wednesday, November 25. Ante.

(85) Ordinary.

BUgby excepted against Prohibition in suit by the Dean and Chapter against the Defendant for a Pension being reserved out of grant of Impropriation by Abby, because this is a suit by a Spiritual person, and the Statute of limitation is no Plea, since 1 Eliz. cap. 19. by which the Bishop, &c. are restrained to alien; but per Curiam, the Plea ought to be allowed

allowed and not refused, but may be over-ruled, and Stet Prohibitio, and on demurrer this will come in question.

Biddulf *and* Harrison. *Thursday*, November 26. Hill. 25 & 26 *Car.* II. Rot. 679.

ERror of Fine was assigned, first in the death of Two of the Four Conusors; which by Wild Justice was in Roe and Evelies Case adjudged Error as to all in real Action, and recovery was thereby wholly reversed. So 2. On the death of one Conusor after Teste, and before the Return of the Writ of Covenant. Rainsford agreed the last Error, but the first only Error pro tanto in a Fine, though in Recovery it be in toto, and reversed. Nisi. (86) Abatement.

Wilson *and* Dove. Hill. 25 & 26 *Car.* II. Rot. 242.

IN consideration the Obligee would deliver up the Bond, the Obligor promised to pay the Interest, unless he make it appear to the Obligee that the mony was paid; the Defendant pleaded the mony was paid, and that notitiam inde dedit & constare fecit to the Obligee, that it was paid; to which the Plaintiff demurred in C. B. and Judgment for the Plaintiff there: whereupon a Writ of Error is brought. And Wild Justice said it ought to be said how he made it appear to the Obligee: viz. by Acquittance, or such other way. Sed Adjornatur. (87) Assumpsit.

Bronker *and* Monpesson. Trin. 26 *Car.* II. Rot. 1217.

IN Covenant setting forth grant of Office of Register to the Plaintiffs Intestate, and the Defendant, and that the Defendant declared his name was used only in trust for Waldron the Intestate, and yet had taken the whole profits, against the Covenant not to intermeddle without appointment of Waldron; to which the Defendant demurred, because the Defendant is the legal Officer: and its not said what the profits received were, though the party be not tied to it in precise evidence; and this the Court conceived ill. Sed Adjornatur. (88) Officer.

Aſhmole *and* Aſhmole. Mich. 25 *Car.* II. Rot. 427. Ante.

(89) Dower. TWiſden on 45 Ed. 3. held it no Error to deny the view in Dower unde nil habet: which the Court agreed; and Judgment affirmed. Niſi.

Tooms *and* Chandler. Ante.

(90) Condition. TWiſden on Hill. 22 Car. 1. Rot. 116. debt on Obligation to perform all Covenants, Conditions and Payments in the Indenture, which was of leaſe, to be void by non performance; the Plaintiff aſſigned breach in non-payment; to which the Defendant demurred: And adjudged for the Defendant, becauſe the Land was to be loſt by the non-payment. Weſtbrook and Prints Caſe, conceived Judgment ought to be for the Defendant; which the Court agreed.

Gooſe *and* Penton. Paſch. 26 *Car.* II. Rot. 606.

(91) Error. ERror of Judgment in Yarmouth, which is only of coſts and damages, per Juratores aſſeſſ. and no Judgment of coſts de Incremento; ſed non allocatur, this being for the Defendants own advantage he ought not to aſſign it for Error; alſo theſe increaſes are ad requiſitionem, and ſo in diſcretion of the Court; and want of it no Error. 2. Judgment was pro Reſid. for the Defendant not guilty, & eat inde ſine die: whereas this appears not Infra Jurisdiction, and if this part be ill, the whole is Error. But Twiſden and Rainsford held this well enough, it being but the ſame Declaration ſeveral ways, and now the later is as void.

Tytherly

Tytherly *and* Smith.

ERror of Judgment below in indebitatus infra pro diversis mercimoniis ante tunc venditis & deliberat. not said Infra. Wild Justice held it well enough, being after Verdict. Twisden and Rainsford contra fortiter; but being Error by Bail of the principal Judgment, the Writ was quasht. (92) Lieu.

Sutcliff *and* Saunderson. Hill. 25 & 26 *Car.* Rot. 427.

SCire Facias against the Defendant as Executor on Returno Habend. adjudged to the Plaintiff of a Cow; after which the Testator died, the Defendant saith he hath fully Administred, and that he hath no other Goods than that Cow; to which the Plaintiff demurred, because its confest the Defendant hath the Cow, which the Plaintiff would have return of, and so not like a general Plene Administravit; which was agreed to be a good plea to Judgment, if no exception, but the evidence must be of payment of as high a Nature. But 2. This was a particular Judgment of a Return, which obligeth these very Goods, as in Custodia legis, so as to them the Executors need not plead fully Administred. Sed Adjornatur. (93) Executors.

Greenway *and* Newland. Hill. 25 & 26 *Car.* II. Rot. 679.

IN debt on Judgment the Defendant pleaded a Writ of Error depending; which being doubted in C. B. because its a riding Action, and if Execution should be before the reversal, and then its reversed, the Defendant would be put to an after Game by audita querela, and could have no restitution, being upon a Writ of Error where there is no such Judgment, the Court appointed it to be argued, but inclined strongly that its well enough, and hath been so often adjudged, as in Debt Br. 107. Seu 106. Adjornatur. (94) Courts.

Caule *and* Bazat. Pasch. 26 *Car.* II. Rot. 368.

(95) Bail. IN Scire facias against Bail on removal of the Principal by Error; the Defendant pleaded that the Writ of Error is yet depending: Which by Wild Justice is no plea, and it should be said it was reverst, or what, because of the first Judgment; for else if the Plaintiff in Error or Principal will be non pros. there would be no remedy against Bail; which Rainsford agreed: but Twisden contra fortiter, that till the Principal be determined no Scire Facias will lie against the Bail, especially out of the inferior Court, for by this means this Court might be made a stawke to execute Judgments below, and so make them publick; therefore its sufficient to say there was Error depending. Et adjornatur to search Presidents, the Bail being always removed as part of the Principal.

Harvey *and* Halstead. Mich. 25 *Car.* II. Rot. 427.

(96) Bar. & Feme. IN indebitatus by Baron & Feme as the Administrator of J. S. on account as Administrator, and arrearages found to Baron & Feme as Administrators, & super se Assumpserunt to Baron & Feme as Administrators; the Defendant demurred, because this would survive to the Husband; and its not said the debt was due to the Wife as Administrator; sed per Curiam this is well enough, and Judgment for the Plaintiff.

Streeting *and* Hinde. Pasch. 26 *Car.* II. Rot. 368.

(97) Covenant. IN Covenant on a Bill of Sale, that the Defendant was the legal Proprietor of Wool sold, and had power; the Plaintiff alledges breach, that he was not Proprietor; and doth not say Et sic non tenuit conventionem, sed infregit; the Defendant pleads tenuit conventionem; to which the Plaintiff demurred; & per Curiam the breach is sufficient, and the & sic infregit is but form, and well enough beside: Judgment for the Plaintiff.

Alderson

Alderſon *and* Dowly *and* Miller. Paſch. 26 *Car.* II. Rot. 374.

IN Action upon the Caſe by two Adminiſtrators for money lent; the Defendant pleads Releaſe of one generally after Imparlance by Actio non, and doth not plead it after the laſt continuance, as it might, being made ſince the Action brought; and for this cauſe the Plaintiff demurred. And though the Bill be of Hillary Term, and Imparlance till Paſchæ next, and the Releaſe in April mean, yet its not good; the Court being Bound to take notice of the beginning of Terms, by Wild Juſtice: but by Twiſden Juſtice on 3 Cr. 210. & 53. the Court cannot take notice of the days of Terms, or at leaſt its in diſcretion; & per Curiam the plea ſhould be puis darrein continuance, and the not pleading ſo loſeth all benefit of the Releaſe; and Judgment for the Plaintiff. Niſi. (98) Adminiſtrators.

Verdale *and* Marten. *Friday*, November 27.

EX motione Mr. Solicitor for a trial at Bar in Trover for Goods to 400 l. value, taken by a Spaniſh-Caper, and brought into Plymouth, and thence Shipt away without Condemnation, becauſe though, Br. Property 38. ſay the property is altered by the Enemies poſſeſſion above 24 hours; which is good where they are brought into ſafe Port of an Enemies Country: yet the conſtant opinion of the Civilians, and the Practice at Guild-Hall in the Dutch-War, is, that if ſuch Goods be brought into Neutral Port; or, as theſe were unto Friends, the property is not altered till Condemnation; And theſe Goods were taken from a French-man in league with us, which is ſtronger: and this being matter of Evidence, though the Defendant was only a Factor, and England could not Condemn the Goods, but the Condemnation was in Holland, whether they were Shipt; yet the trial at Bar was granted. (99) Admiral. (101)

Martyn

Martyn *and* Jackſon.

(100) Trial.

EX motione Sytherfield for a new trial on Parol affirmation of Hale Chief Juſtice to Rainsford Juſtice, that the trial was againſt evidence. Twiſden and Wild refuſed to grant it, the Jury being Judges of the Fact, though Verdict be againſt evidence, its not to be ſet aſide without a new Law: contra by Rainsford, 2 Bulſtr. 222. 24. Juries are wilful enough, and denying new trial here, will but ſend parties into the Chancery, yet new trial was denied.

Barklay *againſt* Blacker.

(101) Amendment.

STroud prayed amendment of Judgment by default, Ideo conſid. quod prædict. Walter B. where this name was Edward recuperet; but there being no Bill Filed of Trin. 5 Car. 1. all the Rolls of that Term being loſt, and this being after the Death of the Defendant in Priſon, to the intent to charge his Lands by Scire facias, being Reverſion of an Eſtate tail lately ſpent; the Court refuſed to amend it, being ſo long agone, though the Bond on which the Judgment was had appeared to be Edward.

Coomes *and* Jenkinſon.

(102) Admiral.

LEvins excepted againſt a Prohibition to the Admiralty on Hill. 12 & 13 Car. 2. Straffords Caſe, and 1 Cr. 296. Hub. 208. Moor 918. pl. 1308. becauſe the Libel is againſt the Maſter, for mony lent to him at Land, becauſe its ſaid for the neceſſary uſe of the Ship; Sed per Curiam if the Ship be in diſtreſs the Maſter may borrow mony beyond the Sea, becauſe they proceed againſt the Ship; but this is a meat Bill of Botomree before the Ship ſet forth: and therefore though it were borrowed for Victualing, a Prohibition was granted; and the former are all exploded opinions per Curiam.

Subchantor

Subchantor *against the Arch-Bishop of* York.

(103) Prohibition.

RAainsford prayed a Prohibition in a Suit on Composition to pay Pension, being said paid also time out of mind; which Levins opposed, because this Libel is founded on the Composition, and the laying payment immemorial is but form in that Court; and this way Prohibition may be in all Cases: Sed per Curiam a Prohibition was granted as to the custom; and this ought to be left out.

Green *against* Turnor *and* Uxor, *&c.*

(104) Conspiracy.

IN Information for Conspiracy to charge the Plaintiff with a Bastard, begot on the Wife of Turnor by the Plaintiff, which is a Spiritual Offence: and it being said they charged him with this offence, and the Court having no conusance, by Twisden Justice no Information lieth: contra by Wild and Rainsford, the Information being for the Conspiracy to draw sums of mony from the Plaintiff, not for getting the Bastard. Sed adjornatur, and Judgment stayed after Conviction.

(105) Costs.

IN debt on Judgment on a nonsuit for Costs, the Record was that Term. Hill. &c. apparet, that the Defendant was demanded, and did not appear; to which the Defendant demurred, especially because its not averred he was demanded, but by recital quod apparet, &c. which per Curiam is ill; but this being in the Continuances, and the Judgment of nonsuit positive that the Defendant counted, and the now Plaintiff appeared and pleaded, and the Defendant was demanded and would not appear, its well enough; but being not concluded pro ut patet per recordum; per Curiam its ill; and Judgment for the Defendant. Nisi.

Dominus

Dominus Rex against Moor *and* Dibloe.

(106) Costs.

MOor was Indicted at Hicks's-Hall upon 5 Eliz. Cap. 4. for using the Trade of a Weaver, not having served as an Apprentice Seven Years; the evidence was he served Six as an Apprentice, and had since as Journyman in the same Trade wrokt above that time: and by all the Justices the service Seven Years is sufficient either way, and the Defendant was found not guilty: and so by Thomson for the Defendant it was resolved by Hale Chief Justice at the Nisi prius at Westminster for Middlesex in the Cause of the Mamme

but Offly said that 15 Car. 2 in Forths Case at the Guild-Hall it was held ill, by Hale Chief Justice, as party per Pale, and no sufficient service; which was agreed if the service were not in the same Trade.

DE

DE
Termino Hillarii

26 *Car.* II. in *B. R.* Anno 1674.

Saturday January 23.

Hale Ch. J. & *Rainsford*
Twisden. & *Wild.*

North Attorny General made Serjeant and Chief Justice of C. B. all on this day.

Witrong *and* Blany. *C. B. Monday.* January 25.

IN Sc. Fa. on Judgment in debt, on death of Blany, Mich. 20 Jac. in Sc. Fa. the Sheriff returns no tertenants, And testatum into Mongomery. Henry Blany, Brother of the Defendant, and Heir is returned tertenant; whereupon Judgment is demanded against the said Henry, the Defendant saith actio non, because he was not tertenant at Purchase of the first Sc. Fa. and thereupon demurred. And 1. if the Defendant may say this against the return of the Sheriff was the question. And Ellis Justice conceived he could not, which was also waved at the Bar, 7 H. 7. 4. 10 H. 7. 23. & 28. and 11 Co James Bags Case, for the party is not without remedy, but may have action upon the Case, and Dyer 212. pl. against Rescous party may aver there was none, for otherwise the Statute W. 2 cap. si convincantur cannot be satisfied, which was for benefit of the Sheriff, who (1) Nontenure.

who hath advantage of it, and so is Quasi a party, but where the Sheriff is a person indifferent, there can be no Traverse nor averment against his return. Mich. 43 & 44 Eliz. Rot. 3 Cr. 872. 2. The main point whether Testatum Sci. Fa. may Issue into Wales, I hold it may well Issue thither: At the Common-law it cannot be denied, that Wales is a distinct Principality of distinct Laws and Language, only held of England in Tenure, not in Demean. Pl. Com. 126. & 7 Co. 21. & 19 H. 6. 12. 21 H. 7. 33.

So no Writs could Issue into Wales, but 9 Ed. 1. by Conquest and Attainder of David and Lluellin Slaine, he had vitæ & necis potestatem, and as 7 Co. 17. he might alter Laws or dispose the lands as he pleases 2 Inst. 195. but there needs no new grant for admitting parties to continue in possession this of it self is a sufficient title to Christians but Infidel Kingdoms having Laws against the Decalogue, they are abolished by Conquest, till new established. And all Lands by Conquest are held mediatly or immediately of him, but need no new Conveiance from the Crown: As in Warrens Case, to whom William the First gave the Manor of Sherborn, whereof the Tenant complained that he was Tenant, and had done nothing against his allegiance, and adjudged with the Tenant, 12 Ed. 1. in 4 Inst. 240. Da. 41. recite, not in Pint, the Statute of Rutland or Snowden Established those that submitted to his Government, and so it continued untill 27 H. 8. though as 4 Inst. 240. its said they were quiet, but took in with the House of Lancaster. Its probable Ed. 1. made a Law of Assizes in proximo Comitatu 18 Ed. 2. Ass. 382 it being said made in Parliament Jurisdiction 34. and 19 H. 6. 12. and there is no Record of such Act of Parliament, 27 H. 8. Cap. 26. made the great alteration, taking away the Welch discrepant Laws, and distinction of language, and unites it to England, which is firmest by union of Laws as Lord Bacon observes all Statutes made and to be made being the same, and no man is capable of Office or Fee unless he speak English as well as Welch, wherefore as the law stands in England 10 Ed. 4. 1. a Testatum lyeth as well into Wales as into County Palatine, 27 H. 8. 26. §. 1. N. 6. 2. As to the Statute 34 H. 8. Cap. 26. that sets up Courts of Justice in Wales enables not Sci. Fa. there, because the Judgment is in C. B. and there is no record there, and to say that Recognizances here or in B. R. and Statutes may be executed there by Process from the Chancery, but there is no mention of Judgments, yet these are included in Recognicance on W. 2. Cap. 45. that gives the Sci. Fa. si recognitio recens fuerit

fueriter ecution shall be presently, which extends to Judgments, and 34 H. 8. being a remedial law, it shall extend to Judgments as well as Recognizance, W. 2. Cap. 45. is now in force in Wales; but beyond contradiction this is an affirmative law, and takes not away 27 H. 8. that was made before, at which time its undoubted such Testatum might be into Wales. Pl. Com. 207. Its adjudged in Stradlings Case, on these very Statutes, but where a Statute is introductive of a new law, only the particular Court shall have the Jurisdiction; but affirmative law Pl. Com. 113 Dyer 50. pl. doth not take away former right or custom, Dyer 155. pl. upon 34 H. 8. takes not away precedent custom to devise all his lands; and this Execution is in furtherance of Justice, so ought to have all favour, ut Debitæ Executioni Demandentur; and here is debt well commenced in C. B. and Judgment rightly given, the parties being in Wales; and no lands here, no Execution can else be gone, and upon new action in Wales the depending of the former here is pleadable in Bar, though original Writs do not Issue into Wales, yet judicialls have done ever since the Statute, and as to Godbolt 214. pl. 305. that Fi. Fa. Capias, or other Judicial Writs ran not into Wales, its Anonymous without other reason than Ipse Dixit, and I doubt whether there were any such Case or not, being not cited in all the latter debates of this point. And Serjeant Godbolt was never the author of it, but latter authorities do farr out-ballance that. And as to 1 Cr. 34. Hutt. 117. Risam and Godwin, that Certiorari could not go into Wales, the party being not subject to the Jurisdiction here at the time; this inclines that where there is a Judgment as here there is, Execution may go out of that Court where the Judgment is, so makes nothing against this, so Moor 274. pl. Ugnell and Paston, Execution cannot go hence into County Palatine on Judgment there, but on Judgment here it may; 3 Car. 1. Hedley 20 Manser and Lewis Case, Testatum Sci. Fa. is said to Issue as well as Elegit, Kell. 202. pl. such Testatum will not Issue to the Isle of Man, because that is not yet united to England; but to Ireland and Wales Execution may be awarded, so Error Br. and 2 Cr. 484. Carews Case, and 2 Bulstr 54. Halls and Rhoteram, Capias ad satisfa. issued to Wales, and so is constant course in B. R. and 2 Bulstr 156. Bedo and Pipers Case Trin. 11. Car. 1. Charles Jones moved to suppress Process into Wales; and on the Case of Bedo it was resolved to go as well into Glamorgan which was an ancient County of Wales, as into Radnor which is a new County; and there is no difference between C. B. and B. R. the law being

the same in both, Mich. 1650. Morgan & Floyd, Elegit into Wales on Judgment in C. B. Mich. 1653. Win & Griffith, a Testatum into Wales on a Judgment in C. B. both adjudged on search of the Presidents, that a Scire facias ought to issue; and so here Judgment for the Plaintiff.

Atkins ad idem, That the Scire facias is well awarded into Wales, as to the first point, that Lud and Penington and Collet and Wats Case, 1 Leonard 205. that there can be no averrement on 2 Inst. 453. on Sheriffs Return, because the Sheriff hath no day in Court, and unless the words of W. 2. cap. had been express that he might traverse he could not. 2. Scire facias or other exception on the like reason may issue into Wales. Originally Wales and England were but one Nation, so the union is but a restitution, both have the same Descent, Religion, Government and Laws before the Romans, and till the time of the Saxons, as all Histories of Cesar, Tacitus, and the Poets divisos orbe Britannos testifie that they were taken as one; but when the Romans left Britain to pursue the Goths, the Britains King Arthur and Kadwallader returned to govern; but on the Saxons success the Britains retyred Westward, and Saxo Wallos nuncupavit, as distinct from other parts of Britain then divided into Heptarchy; Egbert called this England on the Conquest of four of the seven Kingdoms, Wallia is from Galli, as War for Guer, and Ward, Gard, and Gales is often used for Wales, which was all beyond Severn up to the City of Glocester, all the North of Worcester and Shrewsbury was part of Powis Land, Cambd. Britan. 15. Offa drove the Mercians out of the plain into the mountains to Chepstow and Chester, which is the boundary of Wales, and until Edw. 1. time, their Kings and Princes were subservient to England by Homage or Tribute, and though during this time of the divorce Wales had distinct Laws and Courts whence Breve Domini Regis non currit in Walliam took its rise as to ordinary Writs, for Acts of Parliament were then made expresly for Wales, 2 Inst. 531. in 3 Ed. 1. which was six years before the Conquest, and W. 1. cap. 17. the King shall do right to such as complain in Wales or where his ordinary Writs run not; also upon special occasions the King as Sovereign Lord might send Writs, it was not want of power, but because Wales had no need of ordinary Process, they had no County Sheriffs or Coroners and so of necessity mandatory Writs, and Writs of Error were directed to Sheriffs of next Counties, Jones 388. in Error Br. Also at Common Law the King might sue here for his Lands (Selden tit. hom' 293. Heylin 282. Cambd. Britan. 106.

Lands in Wales, or the party by a Quo minus, and for defect of Justice in the Marchers Case, the resort was to England, 19 H. 6. 12. Tryal 4. by Newton, Wales and County Palatine are of one nature originally derived out of England, and if when they are at a loss among themselves, they may resort to this Court, much more may the Power of this Court be exercised to help it self: Hill. 10 H. 4. 22.

The only argument for Coxody in Wales, was because the King had such Prerogative in England, and this is not only applicable to Gacsoin, Guian, Gersie or Gernsie, or such Counties as were not originally part of England, and by 6 H. 5. Jurisdiction 34 & 13 Ed. 3. Jurisdiction 23. & 24. and the Quo minus in the Exchequer; as also by Brief 621. Assize 382. of a Commote of Wales, its proved that the Common-law had Jurisdiction here; and from 12 Ed. 1. untill 27 H. 8. mostly England had the better of the Hostilities, and gained Commotes, and Seniories, Seld. tit. hon. 534. H. 3. pretended to the Conquest of Wales, and gave it to Ed. 1. but notwithstanding this Lluelin the last Prince of Wales, on Articles is allowed the title of Prince of Wales and Dominus Sowdoniæ, Heylin 290. & 491. but Ed. 1. Changed it from a Dominion of Tenure and right to Dominion in propriety on Attainder of David 7 Co. 21. Wales is said omitted, and Protection Quia moratur in Wallia denyed; but this was a Union rather in sound than reality. Six Counties were made, but in H. 7. the British, Northern and English blood were united, but 27 H. 8. Cap. 26. makes the absolute Union, reciting Wales is and ever was a parcel, and member of England, viz. originally at first, and now actually; and had it been only Incorporate, all Process might have gone into Wales, and all the clauses that follow, are either to enforce, and comprehended in that clause, or restrictive of it in favour of the Welch, but nothing restrains executions hence into Wales on Judgments in England; and the effect or operation of the Union hath no operation, but that the Government was united in Ed. 1. time, and that the Laws of England and no other shall be executed in Wales, can have no other exposition; but that Offas Dike be leveled, and a Community of Laws with England per mie, & per tout: The Welsh needed no naturalization, but this naturalizeth the Land. 2. Bulstr. 156. Bedo's Case; the consequent of the Union is that Laws of England are in force in Wales, 5 Co. 49. Vaughans Case, rather than the particular clause of 27 H. 8. Cap. that Laws of England bind there; hence, if there be no restitution, which must be proved by the Opponents, this is com-

comprehended in the general clause, and it follows necessarily on admission of the English Laws, that the administration and Process thereof follow accordingly. Whence followed the division of Counties, which the King might have done alone by the general Clause; and that the King shall have five years to Erect what Courts he pleases in Monmouth; and what should Wales do untill 34 H. 8. they could not use their own Laws, but were to sue in England by vertue of the general clause in 27 H. 8. whence it was understood the Jurisdiction of England extended into Wales; the provision in 34 H. 8. for the new powers to the Officers to the new Courts, and no provision for Sheriffs in Wales doth not imply the Courts here had no Jurisdiction, for Jones 215. & 204. this is only an affirmative Law, and no express words to restrain these Courts, but if 34 H. 8. 26. §. 94. N. 1. have provided for Statutes and Recognizances, being a beneficial law, it shall by equity be extended to Judgments, Pl. Com. 126. by vertue of general clause of Union, in 27 H. 8, there would be two Knights of the Shire had not there been particuler provision: But for one granting of priviledges is strict, but Statutes of Union favourable and the design and scope of the Act is best attained by a free intercourse of Justice; distinction keeping up separation, and if there be any Error, its safest on this hand, for on denyal of such Process, the party hath no other remedy; and none of the Precedents here have been reversed for Error, and this opinion advanceth Justice Jones 418. to support and execute the Judgment, and Jones 255. there is nothing against this, for an Appeal was an original action of fact in Wales, which 24 Eliz. is local, and must be sued in Wales, and was for ease of the people to have Justice at home, but execution, hence doth not disturb them. As to the objection on 1 Ed. 6. Cap. 10. the preamble that Exigents could not be directed to Sheriffs of Wales were needless, is answered, in that this was but their vulgar error grounded on Breve Domini Regis runs not thither, which is still true as to Originals, or as to Judicial Writs on Judgments, there is no Declaration or alteration of the Law, for Exigents, the King being concerned might without the help of this Statute Issue into Wales, and on 5 Eliz. Cap. 23. the mentioning the Kings Writ runs not in Wales, is true, being an original Writ. Windham Justice, ad Idem in both points. 1. That the Defendant is Estopt, to say he is not tertenant, being direct against the Sheriffs return; a special nontenure by lease for years extented on a Statute, or the like may be pleaded to secure possession, so 39 H. 6. 44. 20 Ed. 4. 11. and

11. and Scire Facias Br. a Jointenancy in some Cases may be pleaded, being not absolutely against the return, but this is in abatement, and therefore it must be shewed who is the Tertenant; and so adjudged within these three years here, but general nontenure is no plea, being only for delay without any prejudice of any title; and the Plaintiff in the Scire Facias might have prayed Judgment presently upon this, for the special interest of a lease or Statute is not hurt by this, but advantage may be taken in Ejectment after brought on such plea of general nontenure. 3 Cr. 872.

2. A Testatum Scire Facias may go into Wales, which was anciently part of England; to which the Britons beaten by the Saxons retired, and 27 H. 8. is but an act of restitution; and Register Judicial 43 Da. 28. Scire Facias lieth into Ireland, which was gained meerly by conquest, which shews what may be done for execution of Justice, much stronger than here; it was plain by the Quare Impedits, &c. that the Common-law had influence on them, and that they had Jurisdiction at home was not exclusive of this from above, no more than Counties Palatine, and the Union by 27 H. 8. were sufficient alone to make this Process good there, or in any other Conquered place, not anciently parcel; on execution to Lancaster Writ is to the Chamberlain to do execution ubi Breve Domini Regis non Curit, as usually to the Sheriff immediately, but these Courts have Jurisdiction; for the Grand Sessions have no power of this Judgment here, nor of any judgment out of the Court where the Grand Sessions is, whence they endeavoured to remove such Judgments hither for Execution which the Court hath refused, being a means to make them a stalk to Inferior Courts, but what ever is not restrained by 34 H. 8. is allowable 27 H. 8. Cap. and Judgments are within the words Recognizances, being the same as Recognita or Recordata, by W. 2 Cap. 49. before which there was no remedy by Sc. Fa. and this beneficial construction is the rather made, because the party is else without remedy, so at least Equitable, as to 1 Ed. 6. Cap. 10. which recits 6 H. 8. Cap. 4. which gave Exigents to the next Adjoyning English County, this was not altered by the general words of 27 H. 8. and therefore it was necessary to be altered by 1 Ed. 6. to give the same advantage to the Welsh as to the English, to be subject to the Utlawries in their proper Counties, and by this Act it appointed Sheriffs there shall make Deputies to attend the Courts of Westminster, to receive the Writs Issuing hence, which is a new Law and would be in vain if no Writs might Issue hence, and its

its agreed Original Writs cannot Issue, therefore they must be Judicial, 1 Cr. 444. Error of Judgment in Wales for the Defendant, which was here reversed, and B.R. proceed thereon as in an English County, yet this was by Original: and it was only said by Counsel that Brownlow said no Scire facias lay, and Godbolt 214. is an anomilar as well as anonymous Case; & per Curiam on 2 Bulstr. 51. and Bedo's Case, 2 Bulstr. 156. Judgment for the Plaintiff. And in Sir Thomas Gores Case against Lord Carbury, Scire facias & Elegit thereon; and no exception to this, but that the Sheriff had Returned another Verdict than the Jury gave.

Williamson *and* Hancock. *Tuesday*, January 26.

(2) Ejectment.

IN Ejectment on demise of Lock, Special Verdict find Richard Father of Richard the Defendant seised, and 11 Car. 2. on marriage for Joynture on Joice Barker Covenant to stand seised to the use of Richard the Father till marriage, then to Richard the Son in tail, that Issue was had, and after to the use of the right Heir of the Father, who Trin. 14 Car. 2. levied a Fine unto William and Edward Hanson, with a general warranty to the uses of Susan and Anne Spring in fee, and as Mortgagee; afterward Susan and Anne Confirmed to Robert Hancock in fee; after which Richard the Son came of age in life of the Father; and after the Fathers death, entred and leasd to the Plaintiff: and if entry be lawful for the Plaintiff. Tenant for life, the Remainder in tail to the Son, the Remainder to the Father, who Tenant for life, levies a Fine to two, to the use of Susan and Anne, who Bargain and sell to the Defendant. And Ellis Justice for the Defendant, that the Entry is taken away by the Warranty; which implies a voucher, of which the Heir as privy and assignee only can take advantage and a rebutter, which any in possession may take advantage of F. N. B. 135. G. 1 Inst. 385. and all the Books are cited in Lincoln Colledge, 3 Co. 62. Entry Congeable Br. 42. Ed 3. 19. b. In Formedon the Defendant pleaded feoffment with Warranty; against which it was objected, that he shew what Estate. And by Thorn the veriest stranger may rebut, though not vouch: and though he comes in by way of use; It was between Foul and Doble, Pasch. 26 Car. 2. per Curiam, relying on such Warranty was held good, and so he conceived, and Discontinuance: Br. 3. in Jones 199. & 1 Cr. 145. there was the same opinion, as in Spirt and Bence Case, Demise Br. 1. 1 Cr. 370. the reasons whereof moved

moved the Judgment to be as in Lincoln College Case, 3 Co. 62. The objection of Vaughan Chief Justice was, because that this is a Warranty only to him, and not to Heirs and Assigns, and so not attaching on the Ancestor while the Estate was in him; but after the Estate was conveyed to the two Springs: but he agreed, had the Warranty attacht in Cestui que use, it would be well enough; and he also said Cestui que use might Vouch; which is not warranted by Lincoln College Case, 3 Co. 62. because they come in in the Post; but here its well enough, as the Books 21 H. 69. by Pollard, and 1 Inst. 384. are clear, as on Dedi, Assignee cannot Vouch, but may rebut: and Justice Barclay said in Spirt and Bences Case, that rebutter was so inseparable to Warranty, that condition not to rebut is void in Warranty: contra of Condition not to Vouch, in a private report I have 26 Ass. 8. 22 Ass. 69. on 1 Inst. 385. he that claims above the Warranty shall never take advantage of the Warranty by the Voucher or Rebutter, unless as 22 Ass. 37. the Warranty doth attach. So of Lord by Escheat, and Bastard, and Brother who comes in by the survivor, 1 Inst. 385. Also if the Estate to which the Warranty be annext be gone, there can be no Voucher nor Rebutter. Jones 199. it was objected that the Father took back an Estate for life, and so was not in of the same Estate, yet being in before the Warranty attacht he may Rebut; also the Reversion was resolved to be bound by the Warranty, as 44 Ass. 35. and on a feoffment to uses, the Estate is transferred before the Warranty attaches, yet Cestui que use may Rebut, and here is neither Enrolment nor Livery. So Hancok had only an Estate at Will, and no Estate altered by Bargain and Sale. Atkins Justice, Rich's Case, that Rich the Father Tenant in tail, the Remainder in tail to the Wife, the Remainder to the Heirs of the Father, who levied a Fine to the use of Susan and Anne who Bargain and Sell to Hancock the Defendant, and Mole and Hortons Case, the Court were divided on this point on the collateral Warranty; but of late it hath been as Lit. Sect. 697. & 380. held a bar, and binds the right of the Heir, 1 Inst. 366. and extinguisheth the right. 35 H. 6. 63. Garranty Br. 4. and is a thing annext to the Land, 1 Inst. 385. Therefore its against sense that he whose right is thus extinct should make Title against it, and its Reason that he who is in possession quasi by that Estate should have the advantage of excluding the Heir, the point being in 3 Co. 62. Lincoln College Case, clearly resolved: and the objection was on Spirt and Bens Case, 1 Cr. 370. in devise Br. 1. in which the Court were divided

on Error: but Jones 199. Kendals Case is grounded on the resolution, in that very Case the Clause in the Statute 27 H. 8. Cap. 10. of uses §. 14. that all persons that before the first of May have any Estate executed are enabled to Vouch or have remedy, as well as the persons seised to their use, though Cestui que use comes in the Post; which is a doubtful Clause, and the benefit is allowed to none but until the first of May after the Act; and if it were not just they would not have allowed it to any, if it were, Why not to all? This seems to exclude such as came in after, and they intended utterly to destroy uses, shewing the mischiefs of them, and though there would be none after all persons had notice of the Law, which was not presumed to be till the first of May, 1536. but since they are still continued, and the sense of the Law was, that while uses continued, the Cestui que use might Vouch or Rebut; therefore at least by way of Rebutter they shall have the benefit since; Jones its said that most of the great Estates and Houses in England depend on them in Fines, Bargain and Sale, &c. And the strength of this allowance lies on the Warranty; whence it hath been endeavoured in Parliament to Enact that no collateral Warranty should bar without Assets; wherefore its fit to allow the benefit of the Warranty to Cestui que use. Windham Justice, at the time of the Fine, Walker the Conusee was within age, and before his age the two Springs had conveyed to Hancock; after his age the Warranty attacht, and though Men have some hard opinion of collateral Warranty, yet its the ground of most conveyances, even of discontinuances, most of the ancient assurances being Feoffments with Warranty; and Releases alone would not take away Entries, but with Warranty would; and there is little of uses now but what have the possession annext to them; though the uses spring up they are drowned by the possession, by executing the use: Warranty bars right both of Entry and Action, and else none would be put to Rebut, if he on whom the Warranty descends might by Entry avoid the Estate; Infants indeed may enter, but 1 Co. Archers Case there, is that respect to the Warranties binding Men of ripe age, as well where there can be no Entry as where there is: and 1 Co. 140. in Chudliey Case, the Infant may enter at any time after Age, but if the Warranty descends at full age, he is bound; and there is nothing here that gives any Entry to the Son in Remainder, the Warranty being not gone, though it be doubtful whether Warranty extinguisheth the right: for upon a Reconveyance or Release the Warranty is gone, and the right could not then

then revive; but its only bound from demand, and if there were no person against whom the benefit of the Warranty were to be had, perhaps there could be no Rebutter, 1 Co. 125. its admitted that he that comes in the Post cannot Vouch nor have Warrantia Chartæ for want of privity, but in 27 H. 8. Cap. 10. the Estates are executed to the use as it was in the Feoffees, whence Pl. Com. there is no remitter against that Statute, as Amy Townsends Case, though not in the extent of the fee, yet in the same qualifications of Estate, and on the third Clause of demise, 27 H. 8. Cap. 10. § 14. the time of claim to the first of May next is given, which seems to incline he may Vouch notwithstanding the former obiter opinions, coming in by the Statute in the Priviledge of the same Estate, as well as the Devisees, and no doubt but the Feoffees might Vouch; and its as reasonable Cestui que use may do so to, but here its sufficient if he may Rebut: for if any benefit can be had on the Warranty the Heir cannot enter, and this Rebutter runs with the Land: and be it a Tort ou a Droit the professor unless his Title be paramount the Warranty he shall Rebut. In Sprit and Bens Case the question was as here, whether he on whom the Warranty discended might enter; against which it was objected, that it was a Warranty by Desseisin, which was overruled. 2. It was said here was no person to take it, Cestui que use being a stranger and the Warranty extinct; also Devise which Warranty binds not, nor any way else, unless the Ancester be bound: but its admitted, that if the Warranty continue the Heir connot enter; and in our Case Lock that levied the Fine takes the Estate back, it being not found the Mony was paid, but only the two Springs, Susan and Anne Confirmed; therefore the Warranty remains: and in Jones 199. & Lit. Co. 385. had the Warranty been to both the Brothers, the survivor might doubtless Vouch, and being only to the Eldest and the Youngest, though he is Heir, takes the Estate by the survivor, and so cannot Rebut; but here being by Deed Indented for Mony in Special Verdict, it shall be intended Feoffment, as in pleading without Livery, at least he is Tenant at Will: so his Entry on Lock lessor of the Plaintiff is lawful; and Judgment for the Defendant.

Dominus Rex against the Bishop of Rochester *and* Clerk.

(4) Encumbent.

IN a Quare Impedit for the Church of Laborn in Kent, as in Gross, and void by the death of the Queens Presentee; after which Monke usurpt, after which Queen Elizabeth died without Issue, and after the Crown came to Car. 2. after which Sir Francis Clerk presented two successively; the Bishop pleads as Ordinary; Clerk saith, that Godwin was seised in fee before the Queen: and 12 Sept. presented Barns, and that the Queen after presented by lapse Monk, after which Clerk conveyed to Leviston, who presented Drury, and after granted to Serjeant Clerk, who granted the next presentment to Tod, who on death of Drury presented Tod his Son, after whose death J.S. and Hardy, and after Merry and Hed, absque hoc that Queen Elizabeth was seised in Gross in fee Jure coronæ. Special Verdict find Moor Abby of Graces seised of the Advowson, and dissolved by 31 H. 8. and of the Manno, and that H. 8. was thereby seised: and 32 H. 8. the King granted to Thomas Arch-bishop of Canterbury the Manno, except the Advowsons and other Ecclesiastical promotions; and thus seised by Attainder of Clerk the Church became void, and the King presented 34 H. 8. Woodward, and 37 H. 8. the Arch-bishop regranted the Manno una cum Advocatione to the King; which is confirmed by the Dean and Chapter: and 5 June 37. H. 8. for 3700 l. the King granted the Manno to North. and the Advowson, late belonging to the Abby, and to the Arch-bishop, as largely and amply as they came to the Kings hands by the Abby, Arch-bishop, Scature, or any other way: and if upon the whole Queen Elizabeth was seised in fee, or that the Advowson was not granted by the Patent, 5 June 37. H. 8. then for the Plaintiff: if not granted, pro Rege and for the Defendant. Ellis Justice said its plain the Advowson was on dissolution till the exception in the grant to the Arch-bishop of Canterbury appendant, but then it was in Gross, and can never become appendant again, 11 Co. Leyfords Case, no more than on repurchase; but on grant of Manno, except Trees which are only thereby severed in property, there are parcel by the repurchase by Prærogativa Regis Cap. if the Advowson be appendant it shall not pass, unless named in some part of the Deed, 38 H. 6. 34. in the habend. but the Advowson in Gross must be in the Premises, 10 Co. Whittiers Case,

all

all incidents pass, especially by way of Restitution, as here; and the words in our Case are as large and general words as that Case, yet the Advowson doth not pass, for when the Abbot had it, it was appendant, therefore cannot pass by adeo plene: for Hub. 323. pl. the King is deceived, 4 Co.

Bozuns Case, the second resolution, all his Tiths in D. shall intend a Portion, and not appendant to the Rectory: and in Bozuns Case the Advowson remained appendant as on Lease for years: in 10 Co. Whistlers Case, and all the Cases in Whistlers Case are of Advowsons appendant; but adeo plene as it come to us, or is in our hands: and be it in Gross or appendant, its in the Kings hands and may pass by these words, but the nec non advocatio of the Church of Laborn makes it plain to pass, were there no more; but being Dudum expectant to the Arch-bishop, which was false, they shall not void the Kings Grant, there being a certainty of the thing before, and the King not deceived in Title or Value, Hub 239. these being the most important Prerogative forms, and other mis-recitals not of profit or Title, as in our Case by the additional incertainty, as 10 H. 4. 2. cited in 10 Co. Legats Case: but as 3 Co. Dowties Case, if the first words were incertain it would be void, 10 Co. 103. grant of Office which the Earl of Rutland had, which was false, yet res demonstrandi causa added to that Office that was certainly described before, is void; an untrue consideration as of Service or Mony when there was none, will not avoid the grant, as Co. St. Saviors Case, not that the King is not deceived, but because there is certainty besides. So 2 Cr. 34. Mason and Chambers mis-recital of Rent in the quod quidem in grant of the Mannor was 4 l. which was but two, yet good: So 1 Anderson 158. Haywards Case, a particular grant of the Mannor by name would have cured all the mis-recitals: so here its well granted to North, and derived to Clerk the Defendant. Atkins ad idem for the Defendant, who hath the same right as Sir Edward North had. 1. Without the general words, and with the Pronoun illa, or in Case of a common person, where its not by express name, and a falsity is in the thing granted, or a falsity in one of the illa, 1 Anderson 148. & 3 Leonard 162. it would make the grant of a common person void, a Fortiori of the King, as 2 Co. 33. Dodingtons Case, because illa is not satisfied without the whole sentence, through which it runs. 2. Were the thing named, falsity after will not make void as to a common person, but as to the King, if he be thereby prejudiced, and it comes by the parties suggestion, it will make the grant void, not where the King

King hath no prejudice, as 10 Co. 103. Legats Case, 10 H. 42. differs not from 20 Ed. 4. 48. & 1 Cr. 547. & Roll. & Jones 437. the Vicars Choral of Litchfields Case, the recital that the 28 Acres were in the hands of D. that was false, yet the grant being by express name, was good; but in Case of the King would be void, had the words rested here, contra to Ellis. But, 2. The general words adeo plene makes the grant good, being well passed by the former part of the Patent, for this grants nothing new, yet supplies the falsity that was in the subsequent words, in the grant of the Advowson, late in the hands of the Arch-bishop, and had the words been of all Advowsons any ways in his hands it passeth to the Patentee: the King intended to pass it by what Title soever, and adeo plene as the Abby had it, would pass it; but its further, as any ever had the said Manor or Premises, which includes the Advowson: but beside these the adeo plene, as ea omnia (which includes both Manor and Advowson) Quacunque via, or modo, they came to the Crown; these words clearly pass it, and so intended. Windham Justice, the only question is, If the Patent to North passeth the Advowson, and he conceived it did, and accordingly that Judgment ought to be for the Defendant. 1. That here is sufficient certainty in the first words of grant, not vitiated by the subsequent addition. But, 2. All is supplied by the subsequent general Clauses; in Case of the King, or of a common person, incertainty of the thing granted, voids it; and where the first words are general, and any falsity be in particulars, its void, as Co. Dowties Case, and Co. Dodingtons Case, for Generale nil ponit, unless made out by the particulars, Hub. 171. whether illa be in the generality, or not; also in Case of the King, or common person, where there is once a full certainty, what is subsequent is but Surplusage, which vitiates not, unless there be deceit: and here its totam illam Rectoriam vel advocat. de Laborn, which is the express name of it; and had it stood alone had been without scruple, and the Dudum spectant. to the Arch-bishop, will not make the grant void, for it cannot render it uncertain; for the Court will not intend there were more Churches of that name, unless it had been found or pleaded: and hereby on Jones 445. the Vicars Choral of Litchfield, that the addition being but of Surplusage or things immaterial, hurts not, unless it appeared the King were deceived in Title or profit, as a grant of the Manor of Laborn of 20 l. per Annum, that was 40 l. is void, being presumed the Information of the party, 5 Co. Barwicks Case, and 1 Co. Altonwoods Case,

Case, so where its said the party surrendred, where it was otherways conveyed, its void as parcel of the consideration of the new Patent; had the case been the Rectory, which I had by grant of the Archbishop, the King had been deceived, but the Dudum spectant. is not material whether he had it or had it not, and when the King tells how he had it, that is right by dissolution of the Abby, &c. And 2. admit the general words not sufficient, they are not supplied by any but the last words, the rest being causes copulative must be all true, but the latter words, though it express not the Rectory is omnia & singula premissa, which includes the Advowson adeo plene as it was in the Kings hands, for adeo plene as the Abbot had it would not suffice, he having it only as appendant, and by the exception its totally severed; so the Patentee could not have it as he had it, but being Quocunque modo, in our hands, whether he had it as appendant or in gross, it may well pass, for in disjunctivis sufficit, if any part be true, & per totam Curiam, Judgment for the Defendant. But had it been quocunque modo seised into our hands, it would not make it good, for that is not his title as here it is.

Lloyd *and* Jones. *Wednesday*, January 27.

(77) Rents.

Nota. It was said now to depend in the Grand Sessions, that anciently if B. made Feoffment in fee to the use of the Feoffee reserving Rent, proviso, that if the Rent were arrear, and no sufficient Distress, that then the Feoffor might re-enter; and for Rent arrear the Feoffor distrains, and Quere if he may. Dr. & St. 15. & 74. 2 Leonard 7. pl. 8. Distres Br. 43. (Sen. 42.) Feoffments Fitzh. 26.

Armstrong *and* Gold *against* Cornwall, *& alios.*

(78) Pardon.

IN Covenant to pay 1200 l. on procurement of pardon for Blundell, who kill'd the Lord Taffe in Ireland: the Conditions of the Articles was that if B. were acquited or pardoned they should pay 1200 l. B. was convicted of manslaughter, and the Penalty pardoned, 900 l. was deposited in the hands of Sir John Frederick. Mr. Attorny prayed that Common Bail may be accepted, this being an odious contract to be discountenanced, which the Court agreed as to the acquital, being

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in effect to stifle Evidence, and imbrace Jury, but as to the pardon alone, it might be less illegal; but here is no pardon of the offence within the intent of the Articles, but only a pardon of the penalty of Conviction, and an appearance was only granted.

Lord Ever *against* Trever.

(7) Parliament.

ERror in Parliament since last Session on Judgment in Ejectment, since the Prorogation returned the next Session to be holden at such a day, April 13. Levins prayed this might be no Supersedeas, the Judgment being entred in Michaelmas Term last, as 2 Roll. 491. §. 7. F. N. B. 20 G. on long return beyond the Term of the Writ of Error brought, and 1 H. 7. 5. in Error Br. 107 there was a question if any Error in Parliament should be allowed till the Errors shewed, 3 Bulstr 57. Gold and Deth's Case, Error was disallowed, being more than a Term; and Moor and Bloomers Case, Mich. 14 Car. 2. Error above two Terms was disallowed, and the order of the Lords is only of all causes there depending; and this Writ of Error was Teste 30. of November, which was after the Prorogation; but by Sanders this is no longer in time than Error in Trinity-term, returnable in Mich. ad proxmum Parliamentum alone will not lie, but tentum April 13. is before Easter-term, so well enough. Hales Chief Justice said the order of the Lords concerned not this Case, but on general Prorogation it was once declared, that Writs of Error returned and recorded there were not continued, but otherwise now in that Case; but here is no return made at all, nor record there, and were the Writ of Error Teste, this Term it would doubtless be a Supersedeas, but the intervening Term makes the delay; for had the Prorogation been for a year, the Writ of Error must be allowed equally in both: Also this is no demand of Supersedeas of Execution gone out, but a prayer of Execution, which the Court doth not hinder, and do conceive it is no Seperfedeas; and were this demanded, the Court would so answer that it should be granted or not; but its not proper for them to award Execution, but to leave the party to take it as by Law: and in Limry and Laughans Case the Writ was Teste 10 November Retorn. 1 Die Novemb. proximum futurum, which could not be taken to be the same November (Br. 175.) therefore after the Record removed into the Exchequer, because if it were intended the November 12 Month, it was no Supersedeas; albeit the Mittitur was entred the same Term as

as the Writ was Teste and the Record actually sent, yet the Record to all intents is here till the day of the Teste of the Return: Also when the Great Seal went to Oxford, the Courts would not allow Supersedeas till Errors shewed. And no Rule.

Smith *against* Hawes. Ante.

(8) Executors.

ERror of Judgment in C. B. in Assumpsit on Insimul Computasset, at request of the Defendant Executor of S. was after Verdict for the Plaintiff assigned by Sanders, because here is no sufficient consideration to charge the Executor de bonis propriis, and so the Judgment is ill, it being not laid in consideration the Plaintiff would come to an account, or expressed that the Defendant super se Assumpsit on the account, but per Curiam, though without these proved the Evidence would not be sufficient alone, upon an Insimul Computasset to charge the Executor de bonis propriis, no more than on saying he would pay on forbearance, till such a time the Testators Mony comes in, for this shall be intended out of that Mony, not of his own, without precise Circumstances distain. Yet being after Verdict Judgment affirmed.

Baynard *and* Smith. Ante.

(9) Trespass.

IN Replevin the Defendant Justified damage Feasant; the Plaintiff replied that his Cattle escaped into a Close called Vicars, in which he useth to have Common by cause of Vicinage, and thence escaped into the Defendants Grounds, into the Locus in quo, &c. in default of repair by the Defendant, who by prescription ought to repair against Vicars Close; & per Curiam, this is a sufficient excuse of Trespass, and so where ever the party hath way or any special priviledge, as out of the Common-high-way into adjoyning grounds in default of the owners repair. And Judgment for the Plaintiff.

Warkhouſe *and* Simons. *Hil.* 25 & 26 *Car.* II. Rot. 1577.

(10) Aſſets.

ERror of a Judgment in C. B. in Aſſumpſit by the Plaintiff in C. B. for fees, the Defendant pleads ſeveral Judgments, ultra quod, no Aſſets; the Plaintiff replies that the Defendant paied 10 l. in part of one, and that the ſaid ſeveral Judgments were kept on foot by fraud; to which the Defendant demurred generally, and ſhewed by Sanders. 1. That its not ſaid Quoad reſiduum, it was kept on foot by fraud, ſed non allocatur, for the paiment of 10 l. is but alledged for form: Jones 91. pl. 5. and is not traverſable, but if only 5 l. or above 10 l. were paid, that is but Evidence, and not Iſſuable. 2. That the ſeveral Judgments are kept on foot by fraud, is ill, and ſhould have been diſtinctly peaded to every particular Judgment, ſed non allocatur, for though the Plaintiff might have demurred for doubleneſs, yet on this general demurrer its well enough, being but purſuant to the Defendants plea; and it lieth on the Defendants part to ſay he hath no Aſſets ultra to ſatisfie ſuch and ſuch a Judgment particularly, and then the Plaintiff ſhould anſwer diſtinctly to all, and ſo was Norton and Harvy; and Debt, Fitzh. 7. and the Caſe of Seaman and Dee. Which by Hales Chief Juſtice was after reverſed for Error, becauſe the Plaintiff relicta verificatione of fraud as to one Judgment, took Judgment of Iſſue found for him as to another, but Quære if Iſſue ſo general, or to each particularly be found for the Plaintiff, whether he can take Judgment as to that. Sanders ſaid he might, but the Court doubted, becauſe ſtill if any one Judgment pleaded be found true, the value thereof may be ſufficient to ſink the Aſſets: And Judgment affirmed.

Hughs *againſt* Needham. *Thurſday*, January 28.

(11) Church.

ON Mandamus to admit the Church-warden of Linn choſen by cuſtom time out of mind, and to Swear him, which is but for greater obligation of him in the Pariſh; the Archdeacon returns he had ſworn too, and that it did not conſtare to him, that there was any ſuch cuſtom, which per Curiam

is

is ill, not being positive that there is no such custom; that so action upon the Case might be for false return; and a restitution was awarded, Nisi, because he might exercise the Office on the Election without Oath.

Barnardiston *and* Soam. Ante.

WEston for the Defendant, that the Action lieth neither of it self at Common-Law, Nor 2. for the form as a double return; at the Common-Law on returns per plegios, no Action ever lay for insufficient return; but a Petition to the King for the Sheriffs undue practise, who as Prinn on 4 Inst. 31. in Ed. 3 time refers the matter to the Common-Law or Justices of Assize: if there be no constitution a novelty can have no colour of Law without usage, as Lit. Sect. and the Statutes which enforce this 7 H. 4. Cap. give only penalties at the suit of the King, but take no notice of any damage to the party until the Statute 23 H. 6. Cap. 15. which expresly takes notice no remedy was to the party at Common-Law; and as on loss of presentation no action lay, because he could not make gain of the presentation, so here there was no gainful interest, but all ages have till now rested satisfied with the penalties of the Statute. 2. As to the manner the being hindred to sit in the House of Commons is no loss; and the being put to great expense in making it appear to the Parliament that he was duly elected, is but to have costs here for suit in another Court, and the Commons are proper Judges of the damages and costs, and may give them or not as they think fit; and if no Action lie for malitiose, suing at Common-Law, as was adjudged Trin. 1660. Dawson and Read, sed Curia Contra, that it was adjudged it would lie; but after reversed for other defects in Exchequer-Chamber. And by Hales Chief Justice Action upon the Case in the Exchequer for maliciose, suing him without cause to the intent to hold him to Bail, was adjudged to lie, and affirmed in the Exchequer-Chamber: and so was Swayns Case, but by Weston, though the Action lieth for false return in C. B. per quod he was there forced to arrest him de novo, and put him to expence there; yet this Court takes notice C. B. can tax no damages on false return, but the Parliament may. Also its impossible this return should be ea intentione, to deprive him of his Office, because had the Lord Huntingdower been returned alone, the Plaintiff had means by petition to be admitted, therefore

(12) Return.

there can be no Evidence of intention: Also the Commons might have enforced the amendment of the return, and made it singly; or might have fined the Sheriff for the doubleness, as well as to question it as doubtful; and if the House of Commons have not given the quicker way, this Court cannot supply their default. 1 Roll. 573. Damages for long imprisonment, on Appeal are not recoverable, because the Court might have given them. Levins excepted to the declaration, that its not sufficiently shewed the Plaintiff was elected, viz. that the precedent Knight was dead, but only ut Dominus Rex acceperat recited in the Writ; sed non allocatur unless the former Knight were averred alive, and when he died. 2. The Writ is to Elect at the next County, and make due Proclamation; and its said Proclamation and Election were the same day, and the Proclamation should be precedent for notice of the Country. Sanders. The Sheriff is not bound to determine the Law, but only the Fact as a Minister: and it was difficult to him whether the Plaintiff Elected were by the major part of the Freeholders, or the Lord H. Elected by the major part of the County, but per Curiam being deceptive, all that is out of doors. being only Evidence. Hales Cheif Justice, Had it not been for the Statue 23 H. 6. which gives 100 l. to the party whether there be damages or not, perchance the Election might be questioned. but now if this Court try the Election, as in Nevils Case, precedent to the Parliament, they should lead them; but this is after the decision of the House of Commons, and meddles not with any thing in that interval between the return of the Writ and the sitting in Parliament. Scrogs, The deceptive is not applied to any thing but what the Sheriff might do, viz. make a double return, as well as cause the Election to be at any place in the County deceptive would not be actionable, so non-residence and other circumstances, of which as of equality of numbers the Parliament are the sole Judges; and there may be so many exceptions against the Majority, the minority may prove the better Election; and the consequence of this Action should have been the return of the Indenture, between the Lord Huntingdower chosen ut by the majority, whereas there were no such Indentures; not that ubi revera, he was not Elected by the majority. Hales Cheif Justice, Action upon the Case for double return would not lie more than for an Indictment which are both justifiable, but deceptive makes the gist of the Action, and the Indenture is the Return: Also in a Borough notice must be of the day and place of Election, but in Shires its to be at the next County, and so the Proclamation

mation is the same day; and so is Pl. Com. Buckles Case. Et adjornatur.

Carpenter *and* Andrews.

(103) London.

IN Action upon the Case reciting the Statute 19 Car. 2. Cap. 3. §. 12. of building, and that he should build four Stories and no higher, and that matter of Chimnies should be determined by the Lord Mayor; and that the Defendant hath built a fifth story, viz. a Turret, per quod the Plaintiffs lights are stopt; and special Verdict concluded, that if this be a building higher than by the Act, For the Plaintiff: But being incertain how many foot Covered-roof makes a Story, or whether this exceeded four Stories, it was referred.

Armorer *and* Barns.

(104) Dower.

LEvins excepted on 3 Cr. 101. & 1 Roll. 793. pl. 11. that Dower by plaint in Lyn secundum Consuet. was held ill. 2. The house whereof Dower is demanded, is not said Infra Jurisdictionem, & per Curiam, both are fatal errors, and there should be a special custom alledged. And London and Oxford, who have the same customs are confirmed by Act of Parliament. And Judgment reversed, Nisi.

Ree *and* Barns. Ante.

(105) Merchants.

DEbt of Penalty on Charter-party to sail from Newcastle to Merry-land, and to return to such a Port and unload, as he should be appointed between Newfoundland and Holiland, which is brought by Alicia Administratrix, and breach is Idem Rogerus the Intestate in facto Dicit, which per Curiam was amended by rule after demurrer. 2. It was to pay so much per Tun, and there is half a Tun not mentioned, which as Walbanks Case, so much per Ream for Paper, held ill for odd Quires, but Needler and Gesse 1659. was held good to Write at the rate of so much per Quire for odd sheets: and so by Levins for the Plaintiff; Boulton and Lees Case, which was only misdata, and no demand for the over-days. But Hales Chief Justice, so much per Tun must be averred intended among traders, to include pro rata over or under measure; but here the breach is assigned in non-payment of the whole, and do not say nec aliq. partem inde; but the Court gave leave to discontinue, paying costs.

costs, it being for so great a penalty, albeit remedy remains on the Charter-party.

Briscoe *against* Richardson.

(16) Sheriffs. DEbt on Obligation to the Plaintiff Vicecomes Comitat. not saying of what County. 2. It was to appear and answer, which on Mildmay and Cases Case was held ill, being intended generally to answer any Action, and the Writ was of Trespass. Hales Chief Justice, This being on Writ directed to the Sheriff of Cumberland, and the Obligation by R. and S. of Carlisle, in the County of Cumberland, it must be presumed it was to the Sheriff of that County, no other being named. 2. To answer is well enough, 2 Cr. 286. but the parties agreed to appear and pay costs, and amerciaments, and pleaded in chief.

Norton *against the Church-Wardens of* Kenelworth.

(17) Poor. ON special Verdict in Trespass, the question by Sanders was only whither the Castle end of the Town, may prescribe, to be discharged of the payment of rates to the poor of the other part called the High-Town, & per Curiam, this is a void prescription against 43 Eliz. Cap. of the poor.

Starkie *against* Hart. *Friday*, January 29.

(18) Ways. EX motione Sir William Scrogs against putting off tryal, it was said by Hales Chief Justice, and Wild, that Trover would not lie against a common Carrier, but an action upon the Case on the Common custom, and being stolen or gotten away by a cheat is no Conversion; but Evidence must be of some act of his own, for his bare delivery over by a token is no Conversion; but Trover lieth against the Bailee: Also demand after the Goods delivered over is no Conversion by the Carrier, but it was said by Twisden Justice, and affirmed by the Bar as common in Circuits to have Trover against the Carrier, and ruled that the Tryal proceed.

Breery

Breery *against* Weſton.

WEſton prayed Prohibition to the Chamberlain of Cheſter, in ſuit on Articles to pay Toll by W. to B. for Mills, in purſuance whereof John and Robert, an Infant, Breeries aſſure with collateral ſecurity, whereas John was but Tenant for life, whereupon the Defendant exhibited a Bill to make good the Articles, after which the Plaintiff exhibits a Bill to have the Articles delivered up as impoſſible, and decreed accordingly, which per Curiam is but Cauſe of review, not of Prohibition, for this Court have no Conuſans of equity, but if that Court will ſay that is equity which is not, they may be Prohibited. (19) Chancery.

Gunnel *and* Skudimore. Ante.

JEofferies on Smith and Newſams Caſe, and Rogers againſt Lemery in C. B. prayed full coſts in Treſpaſs begun in Pallas-Court, and brought hither by Habeas Corpus; ſo Cheynyes Caſe in C. B. becauſe the Statute was made for advantage of Defendants that they ſhould not be troubled in the ſuperiour Courts; but where the Defendant himſelf is the occaſion of removing it hither by Habeas Corpus, as here he was, and on 21 Jac. if information below be removed by Certiorari, this Court hath Juriſdiction, becauſe the Defendant refuſed the privilege below; and full coſts were allowed per Curiam: But if the Habeas Corpus had been brought by the Plaintiff, he ſhould have no coſts in this caſe as to breaking Houſe; Verdict for the Plaintiff, and a Mark damages on not Guilty, and as to putting in Timber in a Wall, juſtified by Licenſe: Verdict for the Defendant. (20) Coſts.

Polton *againſt* Monday. Ante.

SYmpſon excepted againſt Prohibition, and prayed a Conſultation on ſuit, in Spiritual Court to repeal a ſuper-Inſtitution, there being no ſurmiſe by the Plaintiff in the Prohibition, that he was inducted; but the Defendant was induct, who ſues below to repeal the Plaintiffs Inſtitution, being never induct, which is not examinable by the temporal Law; nor no Freehold or Colour to meddle with the profits till the induction: but only Curam animarum, but had a Quare impedit (21) Encumbent.

impedit been, & Breve episcopo and super-institution thereon, this Court will Prohibit, being on Judgment and Process of Law, & per Curiam a Consultation, Nisi.

Wilson *and* Doue. Ante.

(22) Usurq.

ERror of judgment in C. B. in Assumpsit to pay 31. interest, unless the Defendant made it appear he paid it Ayers: the Defendant confesseth the promise, pleads payment, and that he made it appear to William Ayers; whereupon the Plaintiff demurred, because it was not said how, but quod Constare fecit to W. Ayers: which Jones 218. pl. 7. is not sufficient unless by Court-Rolls, Testimony or Confession of the party: so 10 Ed. 4. 11. in Condition Br. 151. to which the Court inclined, but being not a special demurrer for this Cause Adjornatur.

Hamilton *against* Sarjeant Scrogs *and* Guilby.

(23) Priviledg.

IN Trespass, the Sarjeant pleaded privilege by custom of C. B. and the Court inclined it lay not where there are several Defendants, though the Action is severable its no plea, but clearly in debt, which must be joynt, its no plea; but they would not presently set it aside till Read as Record.

Cause *against* Bazats. Ante.

(24) Bail.

SCire Facias on Bail in Plymouth, on Judgment against Lamoryn removed hither by Error, where the Defendants were Bail, and the Scire Facias is as against Bail here; to which the Defendant demurred. 1. Because it appears not Bail was in Court, nor that Judgment was not affirmed in the Error, which would make this Court subservient to Inferiour Courts: but this being removed at the Defendants prosecution, who hath already forfeited his Recognizance below, the Court conceived that the Defendant being the cause why such general Process is made a Scire Facias is well enough, as well as a Scire Facias Quare Executionem non, for if the party will not assign any Errors, the Defendant shall not lose the benefit of his Judgment below, which in such case can neither be affirmed nor disaffirmed; and Judgment quod Habeat, Executionem gives no remedy against the Bail

Bail, nor affirms the first Judgment, but Error de recordo quod Coram vobis may yet be brought; and the Records of the Principal and Bail are distinct, yet here is no Writ of Error to remove the Bail; so though they be both clapt in one Roll, and no Judgment against the Bail below; and that the Bail be not removable by Certiorari, as 1 Cr. Risams case: therefore by Twisden Justice Scire Facias cannot be untill Judgment affirmed, and so by Livesy Secondary is the course here on Error in Exchequer-Chamber, no Scire Facias against Bail till affirmed. Et adjornatur.

Dominus Rex and Shore. *Monday*, February 1.

EX motione Bigland for Certiorari to remove Presentment at Lincoln Assizes, against the Defendant for using a Warren in the Common of D. without the Kings Licence which was granted: And Twisden said no presentment would lie, but Action upon the case, or parties may kill the Conies, which was not denyed. (25) Forest.

Jaggard *against* Frip.

IN Action of account as Receptor Denar. the Defendant demurred specially, because its not said by whose hands, & per Curiam, its ill on 45 Ed. 3. and 1 Inst. (26) Account.

Also it was as Receptor Denar. ut Denar. of the Plaintiff, which is but recital, & per Curiam is ill also, but parties agreed to mend, paying costs. 3. It was as receiver between 1658 & 1673, without any certain time, but per Curiam that is well enough, and viz. such a day will be immaterial and not traversable. 4. Special Judgment on such special demurrer, by Wild Justice, as Ellis and Lambert is for insufficiency of the declaration, and not peremptory: But Twisden doubted and said that was by consent not to be peremptory.

Hildersham *and others again* Harrison. Ante.

(27) Fines.

ERror of Fine of Rent charged out of Sudbury in Hertfordshire, that after Teste and before return of the Writ of covenant, two of the Tenants, now the Plaintiffs died and Newdigate prayed to reverse the whole Fine; and so in Roe and Emelies case, it was resolved in a case of a common recovery, or any real action; contrary in a personal action, which was adjudged the first case on argument before Glyn Chief Justice: But upon Infancy, which is a personal defect, Fine shall be reversed only quo ad the Infant: and so Twisden and Rainsford inclined; here but Wild contrary, that reversal must be total on death. Et adjornatur.

Hutchins *and* Thomas.

(28) Usuery.

IN information against the Defendant for Usury, Mich. 1673, the Defendant pleads former information the same Term depending in the Exchequer. 4 H. 7. Cap. 20. 2. Its pleaded after Imparlance in Bar; to which the Plaintiff demurred genrally, & per Curiam being popular, its a good Plea in Bar; and not like a civil Action twice brought, which is only in abatement: Also being both the same Term, and no day pleaded, which ought to be sworn, and in which case there would be Priority as its held on the Statute of limitations, and so here but being pleaded, Ante exhib. Billæ, viz. the first day of the Term, and in C. B. it was resolved last Term, that its a good Plea in Bar; and the Court will examin the Record of the Bail, and of the coming in of the several informations, and it might be pleaded by fraud if exhibited by the same party: or the demurrer specially shewing the cause, but the general demurrer confesseth it was Ante; & per Curiam it ought to be quasht if latter; & Adjornatur to search.

Lutt *and* Smallbones.

(29) Courts.

DEbt in London upon Judgment in B. R. Defendant demurred, and it was doubted whether on Judgment for the Defendant, debt be lost, or that the Plaintiff may still take out Execution. Twisden and Rainsford said he might; Wild Justice contrary.

Drew

Peters *and* Prideux. Ante.

IN a Prohibition the Defendant Pleads that in suit for Tythes the Defendant pleaded that they were Rakings, and notwithstanding that the Judge being of opinion that Tythes were due for Rakings, sentence was against the Defendant there, whereupon he prayed Prohibition; to which the Plaintiff below replied that the Judge accepted the Plea and Allegation of the Defendant, absque hoc, that the Judge refused the Plea; to which the Defendant demurred, & per Curiam, this is only cause of Appeal, and the Issue should be on the refusal of Plea, for if that were accepted the Judges opinions might be as well on the fraudulent scattering, as that Tythes were due of Rakings; and a Consultation awarded, Nisi. (30) Tythes.

Drew *and* Davy. Ante.

IN debt by Executor for Rent on Lease for 100 years to Andrew Davy, who died intestate: the Feme Susan Davy takes Administration, and leaseth part of the Term to the Defendant, and makes the Plaintiff her Executor, and dieth; whether the Plaintiff as Executor or Administrator de bonis non of Andrew shall have the Rent, was the question: 1 Inst. 46. And Stroud for the Plaintiff held the Executor shall have it 1 Roll. 344. coming in under the Lease, whereas the Administrator de bonis non of the first lessee comes in above it; and whether it lieth or not by way of reversion, yet by way of contract it doth, by this special reservation to Executors, Administrators and assigns go to the Executor of the Administrator: and it will be Assets in the Administrator, de bonis non, as a Devastavit. But Twisden and Rainsford inclined the Rent was incident to the Reversion, and is gone with it, and the Executor of the Administrator cannot maintain debt on the contract, but is as Lease by Joyntenant, which is destroyed by Survivor; and Stroud upon Poph. 145. Blackstons Case, said that he that comes in under the Administrator shall have the Rent, contra, where he comes in above him: But by Wild Justice debt lieth without a Reversion, as by Executor of lessee on under Lease of part, as on Lease of part by Bar. and Fem. and the Court said this point were fit for a Reader. Et adjornatur. (31) Executors.

Vaughan *and* Sharpe.

(32) Assumpsit. IN Assumpsit whereas there were divers controversies between the Plaintiff and the Defendant, and the Defendant in consideration of 12 d. did assume to pay 10 l. if he after sued him for any matter precedent to the promise, the Plaintiff alledged payment in Warwick, and Arrest by precept thereon; the Defendant pleaded that since the Assumpsit the Plaintiff assaulted him and he sued for that; the Plaintiff said that he made no assault after the promise; to which the Defendant demurred, and excepted that it appears not where the Court was held, Sed non allocatur, this being waved by pleading. And Judgment for the Plaintiff.

Barnardiston *and* Soam. Ante. *Wednesday*, February 3.

(33) Return. SIR Fr. Winnington the Kings Solicitor for the Defendant, that the Action lieth not at Common-Law; untill H. 4. time there was no Indenture, but Return was B. Electus fuit, which was by 7 H. 4. Cap. 15. made part of the Return, because of the Sheriffs partiality, which alters the Writ and the Return, and in 11 H. 4. Cap. 1. the Parliament ordered punishment of the Sheriff by forfeiting 100 l. and 8 H. 6. Cap. 7. farther adds imprisonment for a year, then 23 H. 6. Cap. 15. provides in the last place for the party Elected, by 100 l. to be sued for in three months by the party, else by any; and this cause relating to Government 4 Inst. 49. is not like other Elections, but to be determined in Parliament, and must be understood no remedy was by action upon the Case, but by publick punishment there; and the party cannot alledge he is damnified other-wayes than any of the rest of the County for every Elector as appears from the form of the Writ, might aver he was thereby destitute of a Knight; and the Election is pro utilitate totius Comitatus, and 5 Co. 72. Williams case is stronger upon this reason, on prescription by Lord of the Mannor to have celebration of Divine Service, for himself and Tenants, giving equal advantage to all; no Action would lie for the multiplicity: Also the examination of the false returns is only in Parliament, which is allowed quo ad the right of election; but may be here as to particular damages; but that being the most principal, this, that is but a consequent ought to

to follow it, and the contrary would introduce great inconvenience on the Sheriffs according to the success of the Major voices in Parliament, which may be but by one; 3 Ed. 3. 18. Stanf. Coron. 153. 4 Inst. 15. for whatever related to Parliament no Information lay, though in 3 & 4 Ph. and Mar. there were some: also had the Sheriff been imprisoned by Parliament, he could not plead that in Bar here, Pl. Com. 121. Dyer 113. Rast. Entr. 146. b. in all the arguments on 23 H. 6. there was no notice taken of any remedy at Common-Law. 4. The damage is intire, as well for the expence after the return as for the return it self, and therefore on 1 Cr. 130. Sir Joh. Elliots Case, which 20 Car. 2. was reversed in Parliament, because whatever was done there is not examinable here; also there is no damage till the Petition made in Parliament: Also the malitiose is but forma Clericorum, not improved by the Verdict, for the Plaintiffs Return is perfect, and the Lord Huntigdowers only by some ut Major pars, &c. and the declaration of the Commons affirming the Election is not like the Probate of a Will sufficient to estop the party from shewing the contrary in mitigation of damages, which being tumultuary is not so suitable to this Court: Also there is no wages till sitting, and they being persons intended for Quality, have but these in ease of service; he loseth no duty, Rast. Entr. 664. was a sufficient justification to Levy for Wages by the Kings Writ, and this matter could not come in question, and in Nevills Case they could never get a step forward, and in 13 & 14 Car. 2. Hughs 3. Part 2316. Lechmores Case: In Bridgmans time the Sheriff was said a Judge as to Election and Adjournment, and whether of Fact or Law no action lies against him. 12 Co. 14. 2. Maynard for the Plaintiff, that the action lieth at Common Law, and the Statute giving a penalty shews it unlawful; and being affirmative takes not away the parties more beneficial remedy; and the generality of the injury, as on Nusance, doth not take away remedy on particular costs and damage, as here, and Hub. 78. St. Johns Case, the remedy by action upon the Case is no more taken away by examination in Parliament, then the remedy on the Statute 23 H. 6. for by this means the Statute should be submitted to the Comons House, and what is debated in the Parliament cannot be questioned out; this return is made into the Chancery, and the action is not brought for a double return, but for a double falsity in Judging on both sides, and neither true: Also actions upon the Case are not in Register, but arise on every Emergency of fraud that cannot be provided against, and here the Return is but inducement to the damage, and no action lieth for the damage alone.

Mr.

Mr. Harris 4 Car. was restored to the Office of a Parliament Man for Oxford, wherein it was said Indictment or Action upon the Case lay against the Major for false Return, though that concern the Government as well as this: and 1 Leonard 187. pl. 263. Action upon the Case against a Justice of Peace for making a Warrant falsly, where there was no just accusation, and the falsity and fraud is fact; which is found by the Verdict. Twisden Justice said this differs not, for Conspiracy or false Return, where the Court amerce, yet the party hath remedy: and in Bags Case, Action upon the Case was for false Return; but by Rainsford there was no remedy any where else. Hale Chief Justice said there is nothing here concerns what is done in the House of Commons, as in Elliots Case; and here is no plea to the Jurisdiction, nor could be, and the Commons have determined the Election, but say nothing of the damage: And Action upon the Case would lie against a Messenger that had intercepted the Return of a Knight, and affirt another name instead of his: and this is the same Case, all the matter being here transacted before sitting: and in C. B. they will amerce the Sheriff for a false Return, and yet Action upon the Case lieth in B. R. by the party for the damage, and the expence is not in the House, but bringing up Witness's and retaining Counsel: and he that is chosen doth unworthily if he do not sit, having an Estate in the County he cannot wave it; and though it be no Imploiment of advantage, yet of Reputation and Trust it is, to be kept from which, as from Coroner, or Common-Councel-Man, Alderman, &c. is a damage whether they have Fees or not, and the Statutes give the 100 l. whether the party have damages or not; so Penalties on extortion of Sheriffs exclude not the parties remedy beside; and this Action doth not anticipate, but follows the determination of the Parliament. Wild Justice said, the saying there was no sufficient remedy, is intended provided by Statute, not that there was none at Common-law: and it was never known the Parliament gave any damage. But Rainsford Justice said it was fit to advise with all the Justices. Adjornatur.

How *and* Stile.

(34) Ejectment on demise of Andrew Fountain, wherein the Case was a lease by John Crook (seised in fee) for 99 years to A. F. after which by Bargain and Sale for a year, and a Release

Release dated the next day, he conveys to Andrew and James Fountain to the use of Cook for life, the Remainder to others: and whether by acceptance of this Bargain and Sale the Lease be extinct or not, was the doubt on the Special Verdict. Pemberton for the Plaintiff: 1. That admitting an extinguishment be, yet its but for a moiety, the ground thereof being not the parties admitting, the lessor had power to make another Lease in præsenti; but the accession of the Reversion to the particular Estate, which cannot consist, which is the reason of a surrender: and if a A. makes a Lease for 99 years to B. and after for 10 to C. and after grants the Reversion to B. the first lessee, this will not extinct it, by reason of the intermediate Estate to C. a stranger; and this being the rule, the quantity of the Estate granted must measure the extinguishment, which is but a moiety. But 2. Here is no extinguishment at all, though at Common-law acceptance of a new Term, or since 27 H. 8. of uses will extinguish the first Term, yet by the Release made here to the use of others, the extinguishment is saved by a Proviso in the Statute of uses, saving to the parties the uses of their former Estates; this being a Clause to keep the Ballance even between the Cestui que use and his Feoffees, that one should not have more advantage, nor the other disadvantage, but as in Equity before, so now executed by the Law, and in Equity acceptance of Feoffment by the lessee to the Feoffors use would be no cause of Subpæna by the Feoffor, during the Term; or at most no Decree as to profits, this being intended but as a kindness, and whoever stands seised to any use, whatever the conveyance be, hath his former right saved; and this is agreed on 7 Co. Lillingstons case, in case of a Feoffment or Fine: and there is the same reason of a Lease and Release: the objection that the Lease was to the use of the lessee, being but with intention to take a Release, is of a distinct consideration from a Lease single: as Judgment in Mich. and Scire Facias against A. to whom B. leaseth, and a day after makes a Release, this cannot be taken in Execution by the Scire Facias, because its coupelled with the subsequent Release; and had there been a bare Release, the lessees Term would have been saved, wherefore the Lease added shall not hurt; also had the Bargain and Sale extinguisht the former Term, the Release would have revived it, as 2 Cr. 643. Courson and Farmer, Quoad the Cestui que use, who is a stranger, as in that Case by a subsequent common recovery, which was intended all but one conveyance; which was a stronger Case than this. West for the Defendant, that

that the Verger is wrought by admitting the lessors power to Lease de novo, and not by accession of the Freehold: and so 5 Co. 11. Blyths Case is expresst, and by this acceptance the lessee admits a use may arise out of the possession of the lessor; also as to the Statute that saves his former interest notwithstanding his seisin to anothers use, that saves no interest but what might be lost by his seisin to another use, which will not save the Lease in question; for Andrew Fountain loseth not his interest by being seised to anothers use, but by his acceptance of a new Lease, which destroys his Estate before the Release is made, and it shall not be revived by the Release, though both be but one conveyance as to the passing the Estate as a Feoffment: for in case of right or title of Entry, Lease and Release will not purge it, nor make any discontinuance, as a Feoffment will by Deed; or without they are but one conveyance, as they must be joyned to perfect the assurance; but if a Rent Charge were granted by such a lessee, or an under Lease by him, before the Release the Releasee hath no remedy but in Equity; and so upon extent of the Lease, had a Lease been to Andrew Fountain for life, to the intent a Release should be to the uses, the saving in the Statute might aid, because the seisin drowns the first Lease, but not so here; for had it been intended the former Term should be saved, there might have been a bare Release to the first lessee. 2. This is an extinguishment of all, both of James and Andrews moyities, the acceptance, and thereby admittance of the lessors power is as to the whole, as fully as if the acceptance had been by Andrew alone, they taking the Estate joyntly and in privity. Hale Chief Justice said 6 Car. 1. Heal and Seckham, A. Mortgaged for Years to B. who redemised to A. on Condition upon non-payment to enter, with Covenant in the Mortgage, that A. should make further assurance, and after A. levied a Fine to B. which was agreed extinguisht the re-demise of B. but if it had been expresst in the agreement, that the re-demise of B. should not be extinguisht, it would not be extinguisht; and the Verdict is that the Lease was ea intentione to take a Release to the use of Cook, &c. Sed adjornatur.

Buxton *and* Singleton. *Thursday*, February 4.

(35) London. EX motione Brewer for a Mandamus or a Precedendo, or other remedy for the Plaintiff who sued debt in the Sheriffs Court in London till Judgment; after which by levata querela

querela it was removed into the Mayors Court, and the Attornies there refused all to act; but on complaint to the Recorder Howel, Judg there, he assigned one Rawlins, who since Viner was made Lord Mayor, he being security for the debt, refused after his Fee received to act farther; & per Curiam he ought to be fore-Judged, the Court there: And though this Court may make Attornies in inferior Courts, yet not in London, by reason of their custom, for only four exclusive of all others, which is confirmed by Parliament: nor can there be any Procedendo, because here is no Bail in B. R. nor will a Mandamus lie for every Defendant in them, in not giving Judgment, and they only referred it to the Recorder again to see Justice done.

Loddington *and* Draper.

DOlby prayed a Prohibition to the Prerogative in suit to Repeal the Administration granted to the Plaintiff at Lincoln, on the death of Wilson, upon an allegation that one York was debtor to Wilson the Intestate, and resident in London, and so bona notabilia; against which the Plaintiff alledgeth that the Obligee and the Obligation were in Lincoln, and suggests refusal of that Allegation; & per Curiam making Oath of the refusal of that Allegation, a Prohibition awarded; but if they admit the Allegation, this being a contest between the Spiritual Jurisdictions, though the interest be Temporal, no Prohibition should be. 438 pl. 10. (36) Administrators.

Lord Leighs *Case.*

ON difference between him and his Lady about settlement of 200 l. per Annum, Pin-mony in case of separation, she upon Affidavit of hard usage, and that she went in fear of her life, prayed security of the Peace against him, which was granted. And by Hale Chief Justic the Salva moderata castigatione in the Register is not meant of beating, but only of admonition and confinement to the House, in case of her extravagance; which the Court agreed, she being not as an Apprentice, &c. but after the parties were reconciled, and all discharged. (37) Bar. & Feme.

Marſhal *and* Ray. Ante. *Friday*, February 5.

(38) Lieu. ERror of Judgment in the Court of the Dean and Chapter of York, in Aſſumpſit in York, infra Juriſdictionem to pay for Lands in D. in the County at large, and the Viſn is de Balliva libertatis; which by Finch is aided by 21 Jac. Cap. ſed non allocatur, the Caſe of Ouſebridge. being on ſearch of Precedents reverſed, though by cuſtom held, and ſo here; but the Court agreed 21 Jac. Cap. did extend to inferior Courts, if any of the bills had been right named.

Emerton *and* Viner.

(93) Impriſonment. ON Pluries Habeas Corpus for the Body of Miſtriſs Hyde, ſuppoſed Married unto the Plaintiff; it was Returned that Tempore receptionis Brevis, nor ever ſince ſhe was not detained in his cuſtody; and after a rule to File it yeſterday, the Defendant prayed now to amend, ſed non allocatur, though it were only alicujus for hujus brevis, becauſe thus every exception would be amended; alſo the Return is equivocal, non detenta prout in Breve ſupponitur.

Courteis *and* Collingwood. Ante.

(40) Aſſumpſit. IN Aſſumpſit by the Daughter to pay Pariſh-Charges, in conſideration the Biſhop would Abſolve her Mother, who was Excommunicated for not paying a Pariſh-rate to the Church. Mr. Attorny excepted that the conſideration is inſufficient as to the Plaintiffs, who have no privity, but as mear ſtrangers that are no parties to the Contract, the Caſe Debt Br. 79. and of Norton and Rippon, and Diſhbon and Donaby, Hill. 24 Car. 1. Rot. 10. 10. Conſideration that the Executor would transfer Goods to J. S. the Defendant promiſed to pay to the Executor, was held good, becauſe the Teſtators Goods were liable to J. S. and he concerned therein; but agreed if J. S. had no debt, but were a mear ſtranger, he could not ſue, Hill. 1654. Rot. 72. in conſideration J. S. ſurrendred, the Defendant would pay to the Son of J. S. which was held good, becauſe the Father is bound to provide for the Son: and here it appeared the Plaintiffs were Church-Wardens, and ſo continued, they had an intereſt in the Tar, but

but nuper Guardiani might be as well 20 Years before or after, and Verdict aids not, but only where if the matter had been otherwise the Jury should have found otherwise: but here whether the Plaintiffs were Church-Wardens or not, upon non Assumpsit Verdict must be for the Plaintiff; and Verdict of slander of J. S. nuper Merchant, &c. would not aid. Saunders the Assumpsit is laid a year before the Action, and though it be not averred they were then Church-Wardens, yet nuper is indifferent, and by Verdict must be intended at the time of the promise. Hale Chief Justice its not necessary the consideration should always move from the parties: but in consideration of Mony paid by A. use may be raised to B. its a matter of damage to whom the promise is made; but this is as an agreement between all persons present, and so its intended a benefit to the promisee, that J. S. should be paid; but if the party be not concerned in the Receit of the Mony there the Bishop doth a wrong to Absolve the party upon payment to a stranger, and so no Action: but here all parties may be intended present, the Bishop, the Defendant, and the Plaintiffs nuper Guardiani: but if the promise be made by A. to B. to pay to C. a stranger, C. hath no remedy: contra here where the promise is to C. upon payment or other consideration between A. and B. Wild Justice said, had the Defendant been said an Inhabitant, this would be a good consideration, because thereby he is eased in the Tax to the Church, but aided by Verdict; which the Court agreed: and Judgment for the Plaintiff. Nisi.

Burdet *and* Threle. Ante.

LEvins excepted in arrest of the second Judgment, in account against a Merchant, as receptor. diversorum bonorum & catallorum, because it should be as Ballivus, wherein he must have Charges; sed non allocatur, this should have been before Auditors, or on plea ne unques receptor, or demurred, especially unto, as in the Case of Account as Receptor, not shewing by whose hands; and this being after the second Judgment, and Error depending, it comes too late, and Judgment for the Plaintiff. (41) Account.

Rumsey *and* Waters. Ante.

(42) Extinguishment.

SAunders insisted that the lessees accepting a Fine owns not his Term, but joyning with him in Reversion it is a forfeiture of his Estate. But by Hale Chief Justice, though 3 Co. Sir G. Browns Case, render for 500 Years was held a forfeiture within 11 H. 7. contra if render for 21 Years, as 2 Cr. Croker and Kelseyes Case, it may be questioned whether this Lease be good after death of the Wife; but here she is found living: but if the Tenant for life levy a Fine to him in Remainder for life, its a forfeiture of both their Estates: but here the Wife hath a Fee, and if the Term under her be not forfeited by 11 H. 7. it cannot be forfeited at Common-law by her Fine to the Tenant for Life or Years, Come ceo, though her Reversion alone might; which the Court agreed. 2. It was found the Defendant was lessee, that Rumsey and his Wife, formerly the Wife of Williams, and a Joyntress levied a Fine to strangers; which is forfeiture of her Estate: then its found the Baron & Feme lessor of the Plaintiff entred on the lessee to his own use, who made the Lease to the Plaintiff; and so there is no Title for the Plaintiff.

Ellesion *and* Brewer.

(43) Infant.

ERror of Judgment in Dower in C. B. where the Tenant appeared by Attorny, and Judgment by default was assigned that the Tenant was an Infant, and should be by a Guardian; & per Curiam Reversed.

Talbot *and* Wright.

(44) Leases.

DEbt for Rent of a Lease assigned to the Plaintiff; the Defendant pleads the assignment was to the use and in trust for Mountpeston, Parson of D. and so void; the Plaintiff replieth, that it was to his own use, absque hoc that it was to the use of the Parson; to which the Defendant demurred; Et per Curiam the Lease is not void if it were to his own use. 2. It was against the Defendant, not said in Custodia Marescballi; sed per Curiam this is aided by common Bail, being after plea.

Tooms

Tooms *and* Chandlor. Ante.

(45) Condition.

DEbt on Obligation to perform Conditions, Paiments, Proviſoes, and Covenants, and Agreements in Indenture; the Defendant pleaded that the Indenture contained a Leaſe by the Defendant to the Plaintiff to be void by non-paiment; to which the Plaintiff demurred. Hale Chief Juſtice, the word Conditions would be idle, unleſs this Bond be effectual; but if the word Conditions were not in, as it would be otherwiſe, and at the Mortgagors election to pay or forfeit; but here perhaps the leſſor had no Title, and ſo its but requiſite the Mortgagee ſhould have his Mony. Sed adjornatur.

Auſtin *and* King. *Saturday*, February 6.

(46) Ejectment.

EJectment by Newman the leſſee of Smith, the leſſee being dead, and the leſſor an Infant. Withens for the Defendant prayed rule for coſts againſt the Infant, in whoſe right the Father ſued; but he having no Aſſets by diſcent, nor the Attorny any ways in fault by naming the leſſee inſufficient, nor there being no timely motion for an able Plaintiff, the coſts being above 50 l. the Executor that had no Aſſets agreeing to pay Ten, the Court accepted it. And by Wild and Rainsford they may charge Executors, or other than leſſor with coſts, as in the Duke of Richmonds Caſe, which Twiſden denied, and ſaid only the ſame remedy lieth now, as an actual Leaſe Sealed.

Boreman *and* Dickins.

(47) Ideot.

POlixphen prayed a Prohibition to ſuit of the Plaintiff, Inhabitant of Brook, where a perſon is a Lunatick, and Coadjutor aſſigned by the Biſhop of Wincheſter, and profits Sequeſtred in the hands of the Church-Wardens, to maintain the Cure by the Church-Wardens; and the Defendant a Coadjutor to the perſon of Freſhwater, who was alſo a Lunatick it by Sir M. Bramſton Official, ſuggeſting that Brook is a diſtinct Pariſh, and not a Chappelry of F. as ſuppoſed; and this plea being refuſed in Spiritual Court, Prohibition per Curiam. Niſi.

Hilderſham

Hilderſham, & *alii*, & Harriſon. Ante.

(48) Fines. NEwdigate on Roe and Evely where two died before the Writ of Covenant in Cheſter Returned, prayed the Fine here as there might be totally Reverſed. But by Wild Juſtice in Roe's Caſe, he that died was the Elder Son, that had nothing to do with the Land, and therefore was totally Reverſt; but here they that died were parties Intereſted in the Realty: yet as Oats and Aylets Caſe, Stiles' as Formedon of Crop which lieth not, and of Meſſuage which is well, yet totally Reverſed, and this was prayed by the Counſel, who being Grantee of a Rent when it was arrear accepted a Fine to Corroborate, and thereby extinguiſht the arreas, having not diſtrained before: and this being pleaded in Replevin in bar thereof, was now prayed to be Reverſed; & per Curiam where the Writ is wholly abated as the Covenant here is, it ſhall be totally Reverſed; but where the Writ is good, and no proper parties, it ſhall be Reverſed only quoad. But Twiſden conceived Covenant no real Action. Alſo per Curiam on the Lady Baltinglaſs Caſe if it be Reverſed, yet the arrears are gone, and not reſtored by Reverſal to be Recovered by new diſtreſs. Et adjornatur. Hale Chief Juſtice abſent.

Powel *againſt* Aſhburnham.

(49) London. EX motione Corbet for a Procedendo in debt againſt two of three Executors; which by cuſtom in London is good; & per Curiam it was granted, unleſs the Attorny on the Habeas Corpus here will appear, for all three to prevent plea in abatement on new declaration.

Loddington *and* Draper. Ante. 433 pl. 36. *Monday*, February 8.

(50) Ordinary. LEvins excepted againſt a Prohibition, becauſe bona notabilia is of Eccleſiaſtical Juriſdiction: ſed Curia contra; bona notabilia is where the Obligation is; and the Court ordered the Plaintiff to declare without altering the Suggeſtion.

Hamilton

Hamilton *against* Gilby *and* Scrogs. Ante.

IN Treſpaſs G. pleaded ſon Aſſault. Sarjeant Scrogs pleaded priviledge, which per Curiam is but a vulgar Error; and notwithſtanding 10 Ed. 4. 5. if he had priviledge, yet in Treſpaſs, though joynt and ſeveral to ſome purpoſes, its not allowable, 1 Cr. 84. againſt priviledge, 15 & 53 & 20 H. 6. 32. b. Cawdries Caſe, 34 H. 6. 29. & 14 H. 4. 11. denied 35 H. 6. Sed adjornatur. Hale Chief Juſtice abſent. 434 pl. 58. (51) Priviledge.

Barnardiſton *and* Soam. Ante.

THE Court ſaid they had conſulted all the Judges of England, and finding great diverſity of Opinions, they would give no Judgment. Adjornatur. (52) Parliament.

Machin *and* Harbottle.

IN Aſſumpſit below, in conſideration the Plaintiff would give the Defendant leave to uſe his name in Ejectment; the Defendant Infra Juriſdictionem in conſideration of ſuch Licenſe Aſſumpſit to keep the Plaintiff harmleſs of all charge, per quod apud Civitatem Lincoln, not ſaid Infra he ſuffered damage: Error aſſigned that the Ejectment being not ſaid Infra nor the damage; & per Curiam its like the Tailor of Baths Caſe, 1 Cr. 570. pl. and the Venire Facias, Præcept not ſaid per Curiam ſervienti ad Clavum, Judgment Reverſed. But Wild Juſtice, ſaid he never could be of that Opinion, yet by reaſon of the multitude of Preſidents aſſented. (53) Aſſumpſit.

Morris *and* Kiffin.

IN debt againſt the Defendant in Remainder for arrears of Rent charge after the death of Ceſtui que vie, an Attary after Imparlance was pleaded in abatement, and agreed ill. 2. It being of Lands in Wales, was brought in the next adjoyning County; which by Wild Juſtice may be well enough, being not on privity of Contract, but by aid of the Statute, or at Common-law. But, 3. Being againſt him in Remainder, it was doubted whether he were a ſufficient perſon of profits. Et adjornatur. (54) Wales.

againſt

against Penſor.

(55) Lieu. IN Aſſumpſit infra to deliver China Dzenges in quadam Nave, not ſaid Infra; which the Court doubted was ill. 2. It was to deliver to the Plaintiff or Aſſignees, and it was averred they were not delivered to the Plaintiff only; ſed non allocatur, this being Error after Verdict on non Aſſumpſit.

Sucliff *and* Sunderland. Ante.

(56) Executors. SCire Facias upon a Judgment heretofore had in Replevin; the Defendant avowed for a Cow, to have a Return; the Defendant in the Sc. Fa. pleads fully Adminiſtred, & non habet alia bona, præter the Cow to return in Withernham; to which the Plaintiff demurred; & per Curiam fully Adminiſtred were a good plea: but had it been that non habet bona præter the Cow alone, it had been ill; but being præter the Cow to render in Withernham, the Court conceived now its well enough; and it muſt be intended the Executor had paid to the value, and ſo had no Aſſets; in which Caſe no Withernam can be Awarded: eſpecially there being no averment in the Declaration that the Cow came to the hands of the Defendant. Sed adjornatur.

Baſtard *and* Stukely. *Wedneſday*, Feb. 14.

(57) Legacy. POlixphen prayed a Prohibition to Exeter, on deviſe of Reſid. bonorum to the two Executors, who both proved the Will, and aſſented to the Legacy, and paid the Debts, and after one of them died, whereby at Common-law the Legacy ſurvived; which was ſuggeſted to be pleaded in the Spiritual Court, and refuſed, becauſe by the Spiritual Court the Legacy doth not ſurvive, but the moiety goeth to the Adminiſtrator of the deceaſt Executor; and without Affidavit Prohibition Awarded. Niſi.

Dakins *againſt* Scrogs *and* Gilby. Ante. 439 pl. 41.

(58) Privledge. OFfly excepted that the Privledge is not ſaid by Bill or other manner. 2. This Action is joynt, 22 H. 6. 51. b. in Treſpaſs. Holt for the Defendant, that the neceſſity

ceſſity of attendance in C. B. is as much the ground of a Sarjeants priviledge, Forteſcue 120. as any others. Hales Chief Juſtice, The queſtion is not whether any may plead at C. B. beſide Sarjeants, but whether a Sarjeant may be impleaded any where elſe; and doubteleſs if this Court aſſign him as Counſel he muſt plead here, and 1 Cr. was in an inferiour Court. 2. The priviledge in Chancery is not to be had in Chancery, becauſe of dividing the action; but in C. B. or B. R. a priviledged man and one not priviledged may be joyned, and M. 1649. Sarjeant Jarmin was committed for not pleading in B. R. and Dugdale remembers Cheny Chief Juſtice ſaid the like of a Sarjeant; and anciently Common-pleas were as well in B. R. as C. B. but reverſed in Exchequer, per Rolt. & per Curiam, a Reſpondeas Ouſter was awarded.

Biddulfe *and* Harriſon. *Thurſday*, Ante. Februray 11.

(56) Fines.

ERror of a Fine levied on Writ of Covenant Teſte, 22 Decemb. Returnable in Hill. Term after, & Poſtea in Paſch. Conceſſa & recordata. Hales Chief Juſtice ſaid this is uſed only of Fines, that are acknowledged at the end of the precedent Term; not to have a Term intermitted, but this is only a voidable Writ, not void, as in caſe of a Capias. Death of two Conuſees, Co-heirs of Goodier was in March Intermediate, and Newdigate prayed Judgment to be totally reverſed, this Fine being pleaded in Bar of arrears before Harriſon, purchaſed of Sir H. Goodier. Hales Chief Juſtice ſaid diſtreſs ſince the Fine is avoided by the Fine Reverſt, but if the diſtreſs were before the Fine it ſtands, and all the arrears before the Fine by Reverſal ſet up again as to the Heirs of Goodier, which the Court agreed, præter Wild, who held the arrears extinct, and not revived no more than forfeiture; but no rule till notice to Jennings Guardian of the Tenant in poſſeſſion, an Infant.

Dominus Rex againſt Haſtings.

(60) Fee.

PRoctor prayed Prohibition to Lincoln in ſuit by the Widow of Proctor, or Regiſter, for fees, & per Curiam a Prohibition was awarded.

Barnardiſton *and* Soam. Ante.

(61) WIld for the Plaintiff, on Dauſon and Reads Caſe, prayed Judgment becauſe elſe here would be a failer of Juſtice: This Judgment was reverſed for Error, Prins Animad. 16. as in a real action Judgment ſhall be here, and Verdict being malitioſe, and no damages in Parliament, it ought to be here. Rainsford for the Defendant, this being Primæ Impreſſionis and no one inſtance of action upon the Caſe at Common-Law, for a bad Return in Parliament, neither before 8 H. 6. Cap. 7. nor ſince, and the Statutes provide both for the King and for the party; and the attempt in the Caſe of Nevil and Stroud, the Plaintiff could never get Judgment, though a man of Power, and followed it cloſe; the Power to determin Returns is in the Parliament, becauſe men came unwillingly to it anciently, and therefore Wages were provided; and if no remedy then but in Parliament, now the place is of more value, its no reaſon the action ſhould lie: The Caſe 1 Cr. 182. of Sir John Elliot was liable to the ſame objections, for the Houſe of Commons could not give damages; yet the Judgment in B. R. was Reverſed in Parliament, becauſe matters ſpoke there is no where elſe examinable. Luke againſt King, No Judgment could be had, becauſe the offence and proſecution was in Parliament, and all the damage was in clearing his Election in the Parliament, therefore either the Parliament may repair or may provide for it, if it be an inconvenience, but there is no power in the Kings Courts: but upon a Return in any other Court the action would lie, and though here the Return be into Chancery, yet when its tranſmitted into the Parliament, then its as much Parliamentary as if returned thither ab initio. Twiſden Juſtice for the Plaintiff; the Defendant hath admitted the Juriſdiction by Iſſue, not Guilty. And 2. becauſe this action is but for the particular offence and damage; not the publick, for the deſign of malitious putting to charge, which is now found by Verdict, & maleficium non remanere debeat Impunitum, wherefore no order being taken for this in Parliament, it muſt either remain unpuniſhed or the action muſt lie. 3. The Parliament give no coſts, but only Fine the Sheriff for his publick offence, whence came the expreſſion that there was no ſufficient proviſion made by thoſe Statutes. Nevils Caſe moves not, being upon Olivers Inſtrument there could never be Judgment. Hales Chief Juſtice for the Plaintiff

tiff clearly, and said deliberation is no delay of Justice, but when its foreseen, this Cause must come by Error before the rest of the Judges, it was no reason to defer till next Term for advise of other Judges, because 2 Jac. though Judgment was in the Exchequer-Chamber, yet being contra, the four Judges of B. R. refused to give here a Judgment suitable to that there, and therefore the like ought to be here. 1. As to the matter arising in Parliament to move against the Jurisdiction here, if this Judgment were to lead the Judgment of the Parliament, much might be said; but here its to follow that Judgment. 2. The matter is not any thing acted in Parliament, but what is Precedaneous to the Return of the Writ. 3. Here is no plea to the Jurisdiction as in Sir John Elliots Case; 1 Cr. 182. and in Lake and Kings Case: Also the proceeding in Sir John Elliots case was not by Civil action, but criminally for a Fine to the King, which was avered within the Conusance of the House. 4. This Court hath nothing to do but with the damages, as on Stroke in the Commons House a Civil action might doubtless be here though no Information; and here being a Verdict only in persuance on the Judgment of Parliament, there is no anticipation, but consequence of their decision, which cannot but give satisfaction to all. 2. As to the Gist of the action, its not within the express terms of any Statute, there being no false but a double Return, and had it been barely for a double Return the action would have failed, which all the rest agreed as special Verdict, to save Jury from attaint; but the cause of the action is the falso, deceptive, and the intent to put the Plaintiff to charge; and that damage did accordingly happen, and if these words be not made out in Evidence all fails. Falso, Is in Returning one, knowing the other to be elected, Deceptive, not to satisfie any doubt, but to abuse the Plaintiff contrary to his own knowledge. 3. Malicioſe, Not ignorantly, but out of spight, to put the Plaintiff to charge; and if any Circumstances can be imagined to make this venomous, it must now be intended by the Verdict, and nothing more clear than Indictment of suspected Thief, not doing of which is Finable, yet falso & malitioſe must be proved, which by probable cause may be excused, and here being none is the cause of action. 2. This being contrary to the Defendants Office, as a Minister not as a Judge, the Plaintiff ought to have remedy; the title Action of the case for Slander is ten times as great as any other, yet 22 Ed. 4. the Abbe of St. Albons Case was the first; the mischief might be as great before, but not taken notice of, and double Returns came in

but of late time, therefore actions could not be long: also not many since have been for false Returns; Pl. Com. Bucklies case; & per Curiam, Judgment for the Plaintiff.

Stafford *and* Wredor Row.

(62) Costs. IN Trespass Domum fregit, and letting in water, taking away Timber, full costs was prayed on Trin. 26 Car. 2. in C. B. and Smith, Verdict being not Guilty as to all but the Timber, and as to that a Mark damages; which Wild Justice denied, it being no reason that the Plaintiff by foisting in more parcels than he ought should have costs.

Stanley *and* Ayles.

(63) Joynder, IN Evidence, Monday Febr. 15. at Guildhall. Hales Chief Justice said Indebitatus by one joint part-owner of a Ship for his share of fraight was joint, or several, at the Plaintiffs Election; and Evidence of the custom of Merchants to bring it alone was sufficient, and one cannot release the others part: also if one take but moety or less of what belongs to his share for fraight, yet the other may sue for his whole share of it, and so it was said to be held in the case of the Coale-Merchants; but the matter ended by reference.

DE

DE
Termino Paſchæ

27 *Car.* II. in *B. R.* Anno 1675.

Wedneſday, April 21.

Hale Ch. J. *Rainsford*
Twiſden. *Wild.*

Godard *and* Lenthal.

(1) Execution.

EX motione Saunders to diſcharge Execution on Sedgwick, becauſe the Creditor had Judgment againſt old Sir John Lenthal, and Execution, and received part, which though 9 Car. 1. Lord Roberts Caſe, Aud. querela lie, and the later Opinions be the Execution alone againſt Marſhal is no ſufficient diſcharge, for that the party taken is in Execution on the firſt Judgment; which Wild ſaid was the undivided opinion in C. B. in Sc. Fa. on the firſt Judgment, and he held it no diſcharge for the miſchief that hath ſince happened in the Caſe of Duckingfield, Warden of the Fleet, of letting the Priſoner go. But by Hales Chief Juſtice here needs no Scire Facias, for however he comes in Execution he is in on the firſt Judgment. Alſo, 2. payment to the Goaler is not ſufficient, as it is to the Sheriff, without the Plaintiffs conſent, and they ordered Aud. quer. and good Bail, becauſe peremptory; and after which the Plaintiff cannot be re-taken.

Dominus

Dominus Rex and Vachel.

(2) Sewers. ON Return of the Commission of Sewers. Saunders excepted that the Decree was for the straitning of the publick Stream, whereby the Meadows of A. and B. could not be overflowed as usual; which is only a private damage, for which Action upon the Case lieth; & per Curiam the Commissioners cannot meddle with it, unless it be a publick prejudice as well as a publick Stream; but the Decree being to reimburse the Expenditor, albeit this be but of the same effect as the Decree of the prejudice; Yet Adjornatur.

Coats *and* Pocock *and* Uxor.

(3) Arbitrement. POlixphen prayed stop of Attachment against the Defendant for not performing an Award on reference at Assizes; sed non allocatur, for the Trial being hereby put off, the party would be deluded if no Attachment should be granted thereon; and albeit the matter was for Butter and Cheese sold by the Copartner for 21 l. and above 45 l. given to one Copartner by the Arbitrator unheard; yet per Curiam either no submission ought to be, or not to be eluspry; but on bringing in the Mony a reference was orderd.

Boulton *and* Cannam. *Thursday*, April 22.

(4) Executors. DEbt in the debet & detinet against the Executor for 240 l. as to one quarters Rent, Nil debet pleaded; and as to the rest the Defendant avers no Assets, and that before any other rent grew due he offered to surrender, which the Plaintiff refused without averring tender of arrears; the Plaintiff replied there was Six quarters arrear, and nothing was paid; to which the Defendant demurred; & per Curiam Issue should be taken on the payment of the quarters Rent, here being new occasion thereof, 1 Bulstr. 22. 11 H. 6. 36. by Newton that the Executor cannot apportion it, but is as an Assignee, so Helian and Casebrook. Hale Chief Justice said that detinet against the Executor after the death of the Testator was held good; as in debet & detinet the Plaintiff having election to charge him as Executor, or as an Assignee, Hill. 14. H. 4. 28. b. by Horton 29. by Norton; and if an Executor doth inter-

intermeddle in any part of the Estate he cannot refuse the Term, nor other part of the Estate, and so it hath been ruled, which the Court granted; and the reason of the other personal Estate is the same, for the Obligation may start up after the Legacy paid; but this Verdict being averred that the Rent was of greater value the Action lieth not in debet & detinet, but only for the value of the Rent Dr. & St. Waver Br. and Wentworth Executors, the Executors must hold so long as he hath Assets, but he cannot plead this in bar; and therefore albeit the Action lieth in detinet 2 Cr. 546. yet not in debet. And by Hale Chief Justice the Executor cannot wave, and Lit. §. 58. when he enters, if the Land is more than the Rent, he is liable in debet & detinet; but if the Rent be more than the Land, he is chargeable only in detinet, if this be specially Averred, Entry or not Entry, Waver or not Waver, tender of surrender or not, is not material, but only the value of the Assets, and so ruled on my own motion. 2. The first quarter ended in September, and the offer of Surrender and Waver is in October, when a new quarter was begun; which per Curiam may be well enough before any new Rent due; and the Court enclined strongly for the Defendant, by reason of the special Averment that the Rent was more than the Tavern let, and if it were deceived by the Defendant, this may be replied by the Plaintiff. Sed Adjornatur.

Husbands *and* Emmerton *against* Viner *and* Adams.

THE Court granted trial at the Bar in Ejectment, notwithstanding the Suit in the Spiritual Court, pro Jactitatione Maritagii with the Lady Hydes Daughter, it appearing by Articles 9 June last, 10 days after Viners Wives death, that there was a Marriage. And 2. Because delay appeared to be in the Spiritual Court by not Absolving persons privy to Clandestine Marriage, quoad testificandum inter Neighbor and Adams, and tried accordingly, and Marriage found for the Plaintiff, &c. (5) Marriage.

Rumsey

Rumsey *and* Waters. Ante.

(7) Bar. and Fem. FIne upon Conusance de Droit on a lease before made by the Husband and Wife, Joyntrels, is not within the Statute 11 H. 7. Cap. 20. the special Verdict of the Fine, and Use thereon, being only ad usum of that Lease; and the Court inclined to Judgment for the Plaintiff. 2. It was desired by the Plaintiff to enlarge the Term in Ejectment; which the Court refused after rule for Judgment, without conflict, though the Court will not suffer any long Lease, but for Five or Seven Years.

Nicholas *and* Cotterel. Ante.

(8) Trades. IN Action upon the Statute 5 Eliz. Cap. 4. for exercising a Trade in Gloceſter brought here. Smith prayed the Judgment of the Court. And Hale Chief Justice said it would not lie here, being contra to 21 Jac. Cap. 4. N. 155. which was designed for ease of the People, it being confined below, it is an implied Repeal of this Action of debt, upon the Statute which cannot be brought there, and Information or Indictment is suable in the County; and where there are words of such distinct natures, if debt lieth not, there Information doth, and there no Protection or Wager of Law lieth: it hath been agreed that if the Defendant will remove Indictment below, this Court will proceed upon such a waver by him of the benefit of the Act made in his favor; and this the Court agreed, notwithstanding Hughs and Barns. But Twisden absent, Adjornatur.

Lewin *and* Alcock. *Friday*, April 23.

(9) Sheriffs. IN debt on Obligation by under-Sheriff to defray the expence of the High Sheriff; on performance pleaded, the Plaintiff replied that J. S. recovered for charges in carrying the Prisoner from Chelmsford to London, not shewing it was done by Vertue of any Habeas Corpus; to which the Defendant rejoyned that this was on private agreement; to which the Plaintiff demurred, because it was not concluded to the Country; & per Curiam, there must be a compulsion shewed by Habeas Corpus to the Sheriff of Essex; without which he cannot deliver him over to another Sheriff: and then there

is

is an allowance upon the account in the Exchequer, as in case of transporting being signed by the Judges; and on prayer the Court granted leave to discontinue, paying costs without Process.

Best *and* Yates.

(9) Admiral.

IN Action upon the case against the Defendant retained to make a Coat, that he made it inartificially, negligently and foolishly; to which the Defendant demurred; & per Curiam this is too general, and it should say wherein, as too long, too short, too wide, too little, &c. 2. Its not said the Plaintiff delivered any Cloth to the Tailor; in which case the Plaintiff hath no damage by the ill making, but might have refused the Coat, & nil Capiat. Nisi.

Otto *and* Leech.

(10) Trades.

IN Trespass against the Defendant, he justified by Process of the Admiralty, in quadam Causa civili & maritima to seise Goods at Billingsgate; to which the Plaintiff demurred. And by Offly alledged, that here is no suit said to be depending, nor the cause of arrest said infra; sed per Curiam as to the Officer the Justification is sufficient without saying infra, unless the Plaintiff allege expressly the cause arose extra Jurisd. 2. In the Admiralty arrest is often before any Suit depending, and by a primum decretum to Sell perishable Goods; and the Court inclined strongly for the Defendant. Sed Ajornatur.

Dominus Rex and Astwood.

(11) Coron.

EX motione Wallup for a new Inquest by the Coroner of Middlesex after one found by the Coroner of the Admiralty, on a Body drowned about Chelsy, but by a Dragger taken up at St. Katherines, and Verdict found by casualty; the Court conceived there was divisum imperium: but this being no death by fall out of a great Ship, though the Admiralty have a Jurisdiction infra pontes, yet not here: and for that this was driven on by the Sheriffs of Norwich, that have bona felonum de se, &c. against the Creditors that had taken out a Commission of Bankrupts against him in his life-time, Adjornatur.

In C. B. *Saturday*, April 24.

(12) Lawyers. THis day proceeded 13 Sarjeants: Peck, Crook and Pemberton, of the Inner-Temple: Calthorpe, Conyers, Barwel and Stephens, of the Middle-Temple: Pedly, Stot and Stroud, of Lincolns-Inn: and Skipwith, Shafto and Rigby, of Grays-Inn.

Hall *and* Johnson. *Monday*, April 26.

(13) Ejectment. ERror of a Judgment in C. B. in Ejectment de Vergata terræ on general Verdict; which by Wild and Rainsford is ill, being uncertain in every County, but the Plaintiff below might have Releast damages as to that, but now its too late.

Gunton *and* Andrews. *Wednesday*, April 28.

(14) Devise. ISsue out of Chancery was if Thomas Gunton did not devise Save-Hall Farm in Suffolk, unto the Plaintiff his Cosin, from his Four Sisters and Heirs Defendants; and Verdict for the Plaintiff: the Court said on the Evidence, that the Statute of Wills 32 H. 8. Cap. 1. had begotten more debate Suits and trouble than it remedied, and was of greater mischief than the Common-law,

Apleford *against* Spencer. *Thursday*, April 29.

(15) Devise. IN Ejectment of the Rectory of Orpington in Kent, a Sine Cure brought on a Lease of two or three Coheirs of Spencer the lessee for three lives, two whereof are in being by lease of Robinson the former Rector; which was since Cancelled by the Defendant Spencer, the Wife of the lessee, and a new lease taken from Say the now Rector in her own name; the Defendant by Will, the 5 June 13. Car. 2. of her Husband, the first lessee, claimed by devise to her for life, the Remainder to the Daughters, Margaret and Elizabeth, lessors of the Plaintiff, and on their death without Issue to the Nephew J. S. and the Court said that in Draper and James case, wherein Wild said he was Counsel, it was adjudged here that such Lands were not devisable; but afterwards in Chancery it was adjudged

adjudged devisable. And Maynard for the Defendant, that the devise is good; he said he had been always an Heretick in this Opinion; See Dyer 253. pl. 99. but on evidence of Re-entry by Doctor Say for non payment of Rent by the Defendant the Plaintiff was nonsuited.

Gibson *&c. against* Thomson. *Friday*, April 30.

IN Trover by the Assignees of the Commissionees on Bankrupsie of Sir Thomas Littleton; the evidence was of a debt by a note called, An Indent of 800 l. by Sir Thomas, who by contract with the King was to Victual a Fleet at 8. d. per diem a head, and made an under Contract with the Pursers of the Ship, one of which was Plaintiff, to Victual at 6 d. per diem, and gave that Note for the 6 d. which per Curiam is a debt within the Statute 13 Eliz. Cap. and an Indebitatus would lie upon such Note, but not upon a Note to provide Victuals until Account stated. 2. It was agreed that before this Contract Sir Thomas was no Trader, and this Contract to Victual Fleet is no more than to Table with a private Man, which will never make a Trader, as a common Ordinary doth within this Statute, which lookt on general Trades by which livelihood is ordinarily got, not on particular Imployment; for so the Kings Butler or Steward, or any other Officer, might be a Trader. 2. Albeit Provisions made for the Fleet be by the Kings direction, but applied to other purposes than contracted, yet this is no more than particular command to a Man to buy Provisions for that purpose. But, 3. If under disguise of such Contract Sir Thomas Trade with other Merchants under-hand or secretly, that is a Trading within the Statute; but the selling off the Surplusage is no more a Trading than a Gentlemans selling off the Surplus of Hay, &c. and its not sufficient to buy alone, or sell alone, but he must be a buyer or and seller: and in Briscoes case between Crisp and Prat, the direction was whether the Inn-keeper got his living by buying and selling, as to the greater part of it, or whether he were furnished by his own Farm; and one single act, though it let into a general dealing will not make a Bankrupt, no more than a Commission of Excise, or a School-keeper that boards Scholars, or Subtellers in Armies, and Butlers and Stewards of Inns of Court, and Farmors of the Customs; and Verdict for the Defendant, by particular direction of all the Court on this (16) Bankrupt.

point, and they would not suffer it to be found specially, albeit pressed by the Plaintiff.

Talbot *and* Wright. *Saturday*, May 1.

(17) Amendment. IN Action of Covenant Queritur de Defendente, not said in custodia Marischalli, &c. Bigland excepted that in another Term this is not amendable after demurrer; sed per Curiam Bail being since Filed right, it was amended, this being no part of the Declaration, and so resolved in the case of Seaman and Dee.

Dyves *and* Edwards.

(18) Lieu. ERror of Judgment in Yarmouth to deliver out of the Defendants Ship Chiny Orenges into the Ship of the Plaintiff, not said Infra, or to the Plaintiff, after Verdict Judgment was Reversed per Curiam, because non-delivery being the breach, it must be enquired what Orenges were in the Ship, being mutual promise to pay 3 l. a Thousand, which cannot be.

How *and* Stile Ante.

(19) Extinguishment. THE question was if the lessee for Years accepted the Lease and Release, if this extinct his Term without argument. Hale Chief Justice cited Heal and Seckhams case, cited in Audlies case, A. Mortgages to B. with Covenant for further assurance. B. re-demiseth for lesser term to be void by non payment, after A. levied a Fine to B. which without any Writing would extinguish the Term, but if there were any agreement that it should be in confirmation the construction of the Law will preserve it: and Ferrers and Vernons case, where the Lessee for Years was made Tenant to the Precipe, to suffer a recovery; although the use was to be to him and his Heirs, yet no extinguishment. Et Adjornatur.

-------- *against* Northy.

(20) Utlary. IN Chancery one Utlawed after Judgment had a stock in the East-India Company, which was made over by the Lord Treasurer to the Defendant, after which its granted to the Plaintiff

Plaintiff by the Company after the Utlary was Reversed, and whether this wholly restore ab initio, or that this is no such debt as is forfeitable was the debate in drawing up special Verdict, and in Sir John Dethicks case it was agreed that the way of transfering by the Company is as the proceed and Fruit of it; and the stock laied in cannot be withdrawn, for sometimes it sinks and sometimes increases ex parte, Ex motione Barwell to be drawn up, for at this rate every mans personal Estate may be swept away by any Dormant Utlary on grant to a Begger.

Arnold *and* Foot.

IN Debt upon Obligation and agreement to pay 20s. a Year so long as enjoyed, the Defendant pleads Entry by the Plaintiff, ante 24 Junii 25 Car. 2. and before any Rent due, and that an Ejectment was brought, and Judgment had in Mich. Term after; to which the Plaintiff demurred, because its not said expulit or amovit, nor that the Plaintiff continued in possession as it ought to be, being pleaded by way of suspension; but by way of Eviction it were well enough, which the Court agreed in case it were payable as a Rent. But Judgment for the Plaintiff, nothing being answered to arrears mean between June and Mich. Term. (21) Rents.

James *and* Pierce. *Trin.* 26 Car. II. Rot. 610.

DEdet on Escape on the Case of Roberts and Trevilian the Court conceived against Hub. 202. Essex case, that on voluntary escape the party doth not lose his interest, but may take him again, and though the Goaler be liable to Trespass for retaking, yet the Prisoner is in Execution; and so in this Case, 42 Ass. it being an interest; and if the Sheriff die new Execution may be taken on permissive escape, anciently on Andr. Quære was allowed, that being thought hard; voluntary escape was held a Bar in Scire Facias, Quare Executionem non haberet, but not in debt on the Judgment after this was deserted, and the same reason is of all that the body is but a pledge, and Execution must be effectual; and in debt its a good Plea to say he is in Execution by Capias, so upon Elegit. Finch for the Defendant, that he cannot be retaken without new Process by Scire Facias, and Hub. 202. was on 3 Ed. 6. Dyer 67. & 5 Ed. 6. Escape Br. 45. and was between Luther and (22) Escape.

and and if the Plaintiff may elect against the Sheriff or party, till when he cannot be said in Execution; and so Prisons would be as a dwelling house; but per Curiam this inconvenience is not so great as if the party should be discharged, and though escape were in the predecessors time, yet the successor is liable at Election of the party. Vaughan and Terril against Wild and Archer in C. B. held on Hub. 202. Sheriff of Essex case, that Scire facias lay not by the party after such a voluntary escape; and in this very case Vaughan Chief Justice directed Verdict for the Defendant in Guildhall, a year since. Adjornatur on special Verdict against the Warden of the Fleet.

Cross *and* Reading. Ante.

(22) Condition. DEbt on Obligation by the Plaintiff as Executor, on condition to save harmless; the Defendant pleads non damnificatus, which is ill; The Plaintiff replies the Defendant did not pay at the day; to which the Defendant demurrs. And Judgment for the Plaintiff, the first fault being aided by the latter.

Tooms *and* Chandler.

2 Lev. 116

(23) Condition. DEbt on Obligation to perform Covenants on conditions and provisoes in Indenture; The Defendant pleads that one condition was to pay on Mortgage, or to be void, and that he was not bound to perform it, to which the Plaintiff demurred, & per Curiam, were it a condition in Indenture, specially recited in the Bond; though thereby Mortgage were forfeit, the Bond is so too upon non-performance, but being generally to perform all Covenants, Conditions, &c. in Indenture, as Pasch. 9 Jac. 2 Cr. 281. Briscoes Case in Cond. Br. 195. it binds only to such as are compulsory, not to such conditions are at the parties Election, to do or not; and so is Hill. 22 Car. 1 Rot. 116. Westbrook and Print. and Carter, this being Penalty, and only to perform what are on part and behalf of the Defendant to be performed, not to perform all that ought to be performed; as in Westbrooks case it was, and therefore adjudged for the Defendant; and this difference, Hales Chief Justice agreed; but Rainsford and Wild said all is one. And Judgment for the Defendant, Nisi. 460. pl. 35.

Wark-

Warkhouse *and* Symons. Ante.

INdebitat. against the Defendant Administrator; he pleaded several Judgments, which the Plaintiff said were satisfied, and kept on foot by fraud; to which the Defendant demurred; and Judgment in C. B. for the Defendant contrary to Jones 91 Letch. 111. because the debt was traversable as well as the fraud, but per Curiam, on Error here fraud only is traversable, notwithstanding Green and Acklands Case; if the Recovery be not agreed, the debt is traversable, but if it be agreed and only continued by fraud, here the fraud is traversable; and where part is said paid in full satisfaction, it must be farther averred to be kept on foot by fraud, for the paiment of the quantity is not traversable. 2. The conclusion that Judicia prædict. are kept on foot by fraud, is an ill Replication, for if any one be kept on foot by fraud, its against the Plaintiff; and the plea is particular that each Judgment was for true debt: &c. And the Plaintiff should reply particularly to each Judgment, that that was kept on foot by fraud; and where he saith no Assets ultra, that is not traversable; but as North and Harvy and Seaman and Dee, where it appears any Judgment is satisfied the Defendant shall be charged, for the Plaintiff must Traverse all; and if one of the Judgments were left out there might be sufficient to pay: also the Rejoynder should be that Judica prædict. nor any of them were kept on foot by fraud, as Tresham's case, for had there been Issues, and one found, Judgment should be for the Plaintiff, notwithstanding 2 Cr. 625. Sams and Mercer: but where Issue is no Assets ultra, the several Judgments plead where one is found a good debt, & per Curiam, both Replication and Rejoinder is ill, Co. Entr. 151. and so the Plaintiff can have no Judgment. 460. pl. 35. (24) Executors.

Henchman *and* Jenkins. *Monday*, May 3.

IN debt against Administrator in the Detinet only supposing a Devastavit after Verdict, of Assets; on plene Administravit pleaded, it was excepted in arrest of Judgment, that this was ill in the Detinet only; and to this the Court inclined, and so where the Executor is the Plaintiff against another (25) Administrators.

another. But Sympson for the Plaintiff prayed Judgment this against Administrator, being not like to where the Plaintiff is Executor, and brings it in Detinet. Sed adjornatur.

Pottinger *against* Corney.

(26) Copyhold.

IN Evidence at Bar in Ejectment on ancient Entail by Feoffment of Jennings, to defeat latter sale and 50 Years possession; the Court conceived that only Copiholds pass by Feoffment of the Mannor, especially no possession having been according to that Deed, nor any Covenant in the Deed to be seised to the same use: Lease-holds pass not, but if possession had been according to the Deed, this might be presumed to pass by special attornment. 2. The Defendant shewed a Fine by Disseisee of the Mannor whereby he conceived the right extinct. But by Hales Chief Justice, this Fine will not extinct Tenements or parcel separate by the Disseisin, nor unless the particular lands whereof the Disseisin is apparent to be comprised in the Fine, the right shall not be extinct, and so was Old Sir Peter Vanlore's Case, the Court shall not intend any thing to be comprised to extinct the right; & per Curiam as to the two Messuages of Bulpan and Woodhouse, Copihold of the Mannor on lease at Will, and so from Year to Year enjoyed without new contract: Verdict for the Plaintiff; as to the rest for the Defendant.

Sanford *against* Clerk. *Tuesday*, May 4.

(27) Patentee.

THe Plaintiff was lessee of Rustat and Samoys Patentee (in trust for the Plaintiff) of the Crown upon murder of a Bastard by the Father of the Plaintiff R. Samford, notwithstanding, not naming, ill naming, or not right naming the premises in the Enquest, & fugam fecit of Coronor. Winnington for the Defendant, except that the Enquest Returned that Samford had nulla bona, so the non obstante not sufficient to convey this Lease. Sed non allocatur, for per Curiam, this is no absolute conclusion, being nulla bona, to their Knowledge in Ejectment of Ship Inn, in Bridgewater. 2. The Defendant claimed by Patent to Vanlore, in 22 Jac. tot talia tanta, &c. as Dyer the D. of Sumerset or Abby of D. had then, and though by way of pleading a lawful usage be sufficient; yet on Issue thereon or in any Evidence, it must appear that the Duke or Dyer or the Abby, &c. had a

Sub

Subſtantive grant of bona & Catalla felonum: &c. By Hales Chief Juſtice, and the whole Court, for moſt Grants of Abby Lands as theſe were, are relative, and no Subſtantive Grants appearing, the other Evidence was diſſallowed; eſpecially for that the Duke of Somerſet was attainted, and ſo his priviledges thereby extinct unleſs regranted. &c. 3. The Lands were Capite belonging to Philip Watts, who having made a ſettlement in his life time of a third divided part, for proviſion of Children or for any other, the intents of the Statute of 34 H. 8. can after devile no more than will make that two parts of the whole, and ſo Verdict for the Plaintiff.

Ireland *and* Mires. *Wedneſday*, May 5.

(57) Baſtardy.

MR. Attorny prayed Prohibition to the Archbiſhop of York, on Appeal from Dean and Chapter of Durham, in the time of Vacation, Guardian of the Spiritualties for Gravamen, in ſuit Ex officio againſt the Defendant for Adultery, upon an allegation there, that Guardian of Spiritualties in Vacation, viz. The Dean and Chapter cannot intermeddle therewith, this being a means to undermine the Trial at Bar in this Court, and by this means all proceedings are ſuſpended, and therefore he alſo prayed a Mandatory Writ, to proceed Secundum legem Eccleſ. in the Gravamen, the Court granted a Prohibition on ſuggeſting the cuſtom for Guardian of Spiritualties to proceed, but they refuſed to grant any Mandatory Writ.

Elways *and* Cottesford.

(58) Patents.

IN Ejectment at Bar the Plaintiff by mean aſſignments claims the Lands as parcel of the ſuppoſed diſſolved Preben-dary (of Sutton cum Bucks of Lincoln) in Northampton by Patent 7 Jac. without ſhewing how this came to the Crown, & per Curiam, having had continued poſſeſſion ever ſince, it will be well intended in the Crown, and ſo upon the deviſe on diſſolution of Chauntries by Ed. 6. of a Quo Warranto againſt Tenants of all thoſe Lands called Terra Regis Edwardi, in Doomsday Book, the Court would not force the Tenant to derive title precedent; nor on the other hand would force the Plaintiff to derive title from the Crown; but if long poſſeſſion hath gone accordingly its ſufficient to intend it, though Mr. Latch. on the firſt broaching this conceit, did obtain a Nonſuit. Or 2. upon ſuch lodging the ti-

tle in the Crown by the Defendant, because the Plaintiff could not derive it out: and on 1 Ed. 6. Cap. 14. confirming the Leases and Surrenders of Prebendaries, its much stronger, as in Vicar of Gosberkirkes case, where it was insisted on to be presentative, and not appropriated, because no appropriation could be without Licence; and none appeared in Armin and Pells case, yet by reason of continual possession the Court presumed a Licence, because the Patent might be lost and not Enrolled; and possession hath gone with the appropriator ever since: and so 12 Co. and Verdict for the Plaintiff: Also per Curiam in 11 Co. 78. Magdalen-Colledge case, and in Leonard, Bert and Johnson its held 1 Ed. 6. Cap. 14. aids want of Enrollment, and want of confirmation by the Dean and Chapter.

Bastard *and* Stukely. Ante.

(30) Legacy. POlyxphen prayed Prohibition to the Bishop of Excester, in suit by the Husband of the Feme, joint Legatee of moity of Goods, and joint Executrix being dead, and he Administrator, suggesting that by her death all survived to the Plaintiff; and this is triable at Law, but the Joynture being severed by the Marriage, the Court conceived it did not survive, but Granted Prohibition, Nisi, this being triable at Law.

Lady Fitzwilliams *and* Westby. *Friday*, May 7.

(31) Tythes. WIlliams prayed Prohibition in suit for Predial Tythes in consistory at Chester, the Defendant by allegation of Lease, claiming a die datus for life; the Plaintiff replies by algation of Lease precedent; the Defendant shews a Lease precedent to his by Rejoinder: and on 2 Cr. 350. pl. 3. for the Plaintiff prayed Prohibition in his own cause, as hath been often ruled on Appeals, yet for the bare Trial of a precedent Lease no Prohibition; but because they adjudged the Law contrary to the Lease, that is ill, unless delivered after the day, and Prohibition was awarded.

Dominus

Dominus Rex and Lord Fitzwalter.

IN a Quo Warranto for Several Fishing between Ray, Sands and Clay-Clods, the Defendant claimed as belonging to the Manor of Burnham, by prescription of que Estate, a Privy Verdict being taken last night, and some doubt of it by Raynsford: now Hales Chief Justice said that rather than starve the Jury, privy Verdict may be taken, and so in Perjury or whereever the King is party, unless in Case of life and death. (37) Executors.

Brown *and* Wait.

EJectment by the Plaintiff, Lessee of the Heir of Sir John Danvers Tenant in tail, the Defendant claimed by forfeiture and vesting 13 Car. 2. Cap. 15. of those of the Kings Judges that were dead, which being words as large as in 26 H. 8. Cap. 13. 44. & 5. & 6. Ed. 6. Cap. 11. §. 4. and Mr. Attorny prayed it might be saved, that the Entail by the Earl of Denbigh 4 Car. 1. is forfeited in Trin. 1647. the Ales of which were by Covenant precedent to Sir J. D. in tail, the Remainder to him in fee, with power to Lease for 1000 Year for payment of debts; and Mr. Attorny conceived the whole Fee-simple forfeitd, because in pleading it must since the Fine be said Sir J. D. was seised in Fee and coveied to himself, &c. which though an instantaneous seisin, and but for paiment of debts, is in the Kings case forfeit, albeit not as to have Dower, &c. 3. On the clause of excepting Estates bona fide to any of the Children, this tail is less than the Fee excepted, being by Conveiance since 1646 as well as to let in a Statute made by Sir J. D. The Plaintiff relied on this, that there is no Attainder; and the bare forfeiture no more than in Trugeons case 12 Eliz. 1 Inst. 130. & 1 Roll. 92. pl. on the Statute of 16 R. 2. Cap. 5. of Præmunire is no Bar, where though the party were attainted, yet no Estate Tail was forfeited; all which the Court held to be points very considerable; and it was found specially. See Moor 523. pl. 691. (38) Dignity.

Skillington *and* Norton. Ante.

(34) Poor. CUstom that the Lower Town pay to the poor of the Upper Town, and none to the poor of the Lower by such as live in the Upper, on special Verdict on distress by the Chief Wardens for Taxes in the Lower Town. Bigland for the Plaintiff in the Trespass; both Vill are in the same Parish, and the Plaintiff hath no Lands in the Lower Vill where distress is; the Court conceived that since 43 Eliz. Cap. 2. §. 9. N. 1. there can be no custom, but particular Chapel that hath Church Wardens, are a Parish in reputation; and therefore are discharged, and not by the custom: Also the Statute 14 Car. 2. Cap. 12. §. 21. of Great Towns is in Lancashire and elsewhere; and here its found a Great Parish consisting of many Vills, which in C. B. was held not to extend to Cambden and any other Towns; but in that special Verdict it was not found a great Parish. Sed adjornatur.

Toomes *and* Chandler. Ante. 454. pl. 23.

(35) Condition. DEbt on Obligation to perform Covenants in Indenture of Mortgage to be void on non-paiment, and no special Covenant to pay the mony; the Defendant pleaded performance; the Plaintiff demurred, & per Curiam. Condition Br. 195. Briscows case 9 Jac. and Westbr. and Prints case. Judgment for the Defendant, unless the Plaintiff discontinue.

Symons *and* Warkhouse. Ante. 455. pl. 24.

(36) Executors. ERror of Judgment in C. B. in Action for Fees, and Indebitatus for money laid out; the Defendant an Executor pleads six several Judgments, and that each is for true debt, and he hath only 5 l. not sufficient to satisfie; the Plaintiff replies paiment to each severally, part in satisfaction, and that all the said Judgments are kept on foot by fraud; the Defendant rejoyned, that Separalia Judicia are not kept on foot by fraud; to which the Plaintiff demurred. And Polyxphen on 1 Roll. 802. §. 6. Croydon and Atway Rot. 721. where one of the Judgments being faulty, and the plea intire, and because the Issue on Assets ultra was not tryed, Judgment was Reversed in Error, because it was not reason to charge the

the Executor, unleſs he had Aſſets ultra, what was found due upon the Judgment, prayed Judgment for the Defendant; yet here is no prejudice by Wild Juſtice, for Judgment muſt be de bonis Teſtatoris, becauſe if 19 of 20 Iſſues be found againſt the Plaintiff, yet if one be for him he ſhall have Judgment. But by Hales Chief Juſtice and Rainsford Judgment muſt be ſpecial and not generally de bonis Teſtatoris unleſs Aſſets be found as to all, for this Judgment will include all the Judgments pleaded, and if the Defendant ſhould be tried if any one Judgment be ill, to pay the whole, it would be unreaſonable; and it ſeems as hard that the Plaintiff ſhould recover the Aſſets: but if the Iſſue were on Aſſets ultra, then though Aſſets only to 10 l. yet a general Judgment de bonis Teſtatoris ſi, &c. if not, coſts de bonis propriis, and not any Judgment as to the 10 l. only: But Wild, in the caſe in queſtion there can be no enquiry, but all the Aſſets of the Teſtator ſhall be liable to this Recovery, and C. B. Car. 2. in Clifton and Pickerings caſe, the Defendant pleaded 10 ſeveral Judgments, the Plaintiff replied one was kept on foot by fraud; to which the Defendant demurred, becauſe the reſt were not anſwered, & per Curiam, Judgment for the Plaintiff, which differs not from this, and if the Executor hath Aſſets to 400 l. and five Judgments of 100 l. a piece, and one Judgment on Iſſue on fraud is found by fraud; now if Judgment be for the Plaintiff, one hundred pound ſhall be taken to ſatisfie this; and its no plea on Writ of Enquiry of the reſt, that there are other Judgments, and there is no way better than to confeſs one or more Judgments, and to plead no Aſſets ultra to ſatisfie that, where ſeveral Declarations comes in the ſame day, yet it hath been ſaid that the Defendant hath no Aſſets ultra, 12 l. and though an Executor may know whether Judgment be by fraud or ſatisfied; yet becauſe the Teſtator may ſatisfie, its no reaſon to charge him with the whole: Alſo in Dee and Everards caſe, where ſeveral Declarations are the ſame Term delivered in Vacation, or after Imparlance to ſome, yet before the plea pleaded, the Defendant Executor may confeſs Judgment to any one, and plead no Aſſets ultra to ſatisfie that againſt all the reſt, whether latter or precedent: Alſo the concluſion prout per ſeperalia Judicia is ill, as Sams and Mercers caſe. 2 Cr. 625. But by Sanders for the Defendant, this concluſion hath been held well enough, and ſo uſed of later time. Adjornatur.

Brown

Brown *and* Collins. *Trin.* 26 *Car.* II. Rot. 692.

Fin. (32) DEbt against Administrator of Mindueh Executor of Clap in Detinet on Devastavit of Executor, special Verdict on non detinet. Sanders for the Plaintiff on Cory and Thyns Case: and Mich. 20. Car. Rot. 740. and Wheatly and Lanes case, conceived this, now an Action Ex Quasi Contractu, not barely ex debito for the Common-Law in no case gives debt for a meer tort; sed Curia Contra, as on breach of By-law, and as in Lampets case, it was said it behoveth not to go the least degree farther, no more than an Executory devise, or in debt against Executor on Escape, so here: but Wild said that 11 Car. 1. Executor of an Executor was held chargeable, but per Curiam here the Administrator of the Executor is not chargeable: Nor by Hales Chief Justice, is Executor of Executor by Sc. Fa. or debt, though where the Sheriff receives money the Administrator or his Executor is chargeable: but 9 Car. 1. Hales Chief Justice said a Devastavit of Executor cannot be Returned against his Executor. And Cory himself expected no Judgment, but having Bail to keep it on foot, had Judgment 1655 in C. B. sub silentio, which was after affirmed in Error here 1656, but if Devastavit be returned against the Executor, that may charge his Executor, but debt was held would not lie. And Judgment for the Defendant, Nisi.

Ashton *and* Jennings. *Monday*, May 10.

2 Law 1337 (33) Treason. IN Trespass by the Plaintiff Dr. of Divinity; the Defendant Justice of the Peace in Plimouth justified by Sanders, because the Plaintiffs Wife being invited to a Funeral, refused to give place to the Defendant, moliter manus imposuit, to put her out of place; to which the Plaintiff demurred: And by Rainsford and Wild, this is matter for the Court of Honour, but no sufficient justification, as on disturbance in Trade, &c. it might. And Judgment for the Plaintiff, Nisi.

Pierce

Pierce *and* James. Ante.

RAinsford and Wild conceived that a voluntary eſcape ſuffered only to gain Fees, ought not to be countenanced, nor is no plea in bar, the party being intended to return to Priſon again at his day, and ſo he did here; and the ſame rule between Lenthal and Lenthal of Judgment for the Plaintiff, Niſi. (39) Eſcape.

Green *and* Sutcliffe. Ante.

ON a Scire Facias againſt the Executors of the Plaintiff, in Replevin to know why he ſhould not have Execution of Ret' habend' adjudged on Verdict againſt the Teſtator; the Defendant pleaded fully Adminiſtred all but this Cow; to which the Plaintiff demurred. And by Rainsford and Wild this Cow being in Cuſtodia legis, is in his hands, and ſo Aſſets; and if an Averia elongata be returned, a Writ of Withernham ſhall be de bonis Teſtatoris: and if the Sheriff Return the Teſtator had no Goods, on a Scire Facias with a Fieri Facias, there remains no remedy, but as on Devaſtavit; and Judgment for the Plaintiff. Niſi. (40) Executors.

Drew *and* Brally. Ante.

IN Covenant by the Executors of the Adminiſtrator, Davy who leaſt part of the term of 99 Years to the Defendant; the Defendant pleads the demiſe and Covenants performed till ſuch a day, and then Davy the Adminiſtrator died, and no Adminiſtration de bonis non is committed. Wild Juſtice conceived the Executor Plaintiff may have this Action of Covenant on the perſonal Contract of the Adminiſtrator, though breach be aſſigned in non paiment of Rent, but he cannot diſtrain, becauſe that is only incident to the Reverſion. But by Rainsford Juſtice all is one. But Hale Chief Juſtice abſent, Adjornatur. (41) Executors.

Hinchman *againſt* Kendal. *Tueſday*, May 1. Ante.

SYmſon for the Plaintiff held debt againſt the Executors on a Devaſtavit in detinet only to be aided by Verdict, as Cumber and Walton, the Plaintiff here having the fruit of (42) Executors.

of his Suit, and so the difference is between the Executor, Plaintiff or Defendant; sed Curia contra, here can be no Judgment de bonis Testatoris by reason of the Devastavit, nor de bonis propriis, because in the detinet only; also this is a different Issue, nil debet & nil detinet, and Issue here being fully Administred, he can be chargeable but as Executor, and not in his own right; and this Judgment against him is as the Executor would take away the Assets that are to pay others; but the parties agreed to pay costs and mend all, and begin again.

Dominus Rex and Boulton.

(43) Mandamus.

ON a Mandamus to restore Sir William Boulton to the place of Governor of Bridewell, the City of London return the Foundation by Ed. 6. and that the Mayor and Commonalty are Governors, and that they removed him for not accounting for 1000 l. received. Polyxphen excepted, That 1. No Power is in the City to turn out any Governor by Grant or Prescription. 2. The receit is of divers sums of Mony in toto 1000 l. which is too general; also it appears not to be relative, as he was Governor, but for the benefit of the poor of London in time of the Fire, and after, which may be true, and yet due paiment made to the Hospital; and the Court doubted both of this and the want of Summons, and of setting forth Power; and Restitution, Nisi.

Dominus Rex and Brightwell.

(44) Poor.

OFfly on 14 Car. 2. Cap. 12. excepted to an Order settled in Sessions and Assizes by Atkins, for settlement of Peak, 7 weeks as Servant at Brightwell, but his dwelling mostly and oftenest times at Foxall, and sometimes as a hired Servant at Brightwell, and there settled; whichby Offly being as Servant is no cause of settlement; also here needs no Certificate; and its not said he was 40 days there, but the greatest part of 7 weeks. Hales Chief Justice and the Court conceived that bare Service or Journywork is not sufficient for settlement; and what is settlement or not, is meer Fact and uncertain: and therefore the Court referred it back to the Judg of the Assize, and they conceived an Appeal may be hither notwithstanding the Judge of the Assizes Order, as on Bastardy.

Dominus

Dominus Rex and the Lord Fitz-Walter. Anté.

(45) Fisth.

SArjeant Maynard excepted in arrest of Judgment in Information in nature of Quo Warranto for using several Fishing in several Mills and Parishes named; to which the Defendant appears and denies the usurpation, and claims Franchise, & Venire Facias is but only from the Mill of Burnham, which is ill: and so 1 Cr. 311. and Jones 320. in Sherington Talbots case, a Venire Facias of that Manor that should be of the Mill; & per Curiam this is ill, and not aided by 16 & 17 Car. 2. Cap. 8. but by reason of the last Proviso which saves Indictments and Informations on penal Laws; this and being neither, the Court doubted. Et Adjornatur.

Dominus Rex and Howel.

(46) Games.

OFFy prayed Judgment on Information on 2 Roll 79. & 2 & 3. Philip and Mary Cap. 9. upon Verdict against the Defendant for keeping a Cock-pit, 11 Co. 87. b. though it be not contra formam Statuti, this being an offence at Common-law, as well as a Dicing-House, and cannot be set up by any License: and as in 3 Inst. Noy had a Writ without any Presentment on 33 H. 89. §. 11. N. 1. to amove Bowling-Ally in St. Dunstans, and it was pulled down as a common Nusance: and so was Jacob Halls Dancing-House. Also the Indictment as for Perjury may be good, as at Common-law, and though not said contra formam Statuti, yet the Statute may guide the Fine. Adjornatur.

Barfoot *and* Freswell *and* Picard. *Friday*, May 14.

(47) Joyndef.

IN Covenant against two on demise of a Cole-mine, by two, except the fourth part; whereby its recited that before Sealing of the Indenture it was agreed on consideration that the Plaintiff should have the third part of the Coals digged. On demurrer to the Declaration, Wild excepted that here is no Covenant to pay the third part, but a recital of agreement to have it. But by Hales Chief Justice, were it but a recital, that before the Indenture they were agreed, it is a Covenant: and so to say whereas it was agreed to pay

20 l. for now the Indenture it self confirms the agreement, and intent Precedent, though it be relative to the former Act in pays, when its declared by Deed, its now a Covenant by the Indenture; and Judgment for the Plaintiff.

------ *against* Tufton.

(48) Abatement. ERror of Judgment against 5 in C. B. was assigned in the death of one before Verdict; which per Curiam is Error, notwithstanding 17 Car. 2. Cap. 8. being expired.

Howard *and* Wich.

(49) Condition. ERror of Judgment in C. B. in debt on Condition to pay and satisfie out of the profits of the Cole-mines clear, and avers breach, the profits were 20 l. the Defendant pleads there was no clear mean profits, and Issue thereon; and Verdict that there were clear profits 20 l. as the Plaintiff alledged; & per Curiam here is no good breach alledged. And 2. The Defendant is not Estopt by the Bond to alledg there were no mean profits, being general; and Judgment for the Defendant. Nisi.

Cartwright *and* Buckney.

(50) Executors. IN debt on Obligation after Parol assignment of the Term, the same as was bought by the Testator 24 & 25 Car 2. The Court conceived the Action lay well enough on the Contract, Sed Adjornatur.

Boulton *and* Cannam.

(51) Rent. DEbt in debet & detinet for Rent as to one Quarter, nil debet as to the rest, that the 1 Octob. before due, the Executors offered to surrender and wave the possession, and that they had no Assets, and the House was of less value than the Rent; the Plaintiff replies, that at the same time of the surrender there was 40 l. arrear. Polixphen for the Plaintiff, conceived he could not wave: and 21 H. 6. 24. on which Dr. & St. and the later Books are founded, is denied in Yelverton 103. and Paul and Moody 17 Jac.

and

and the Court agreed he cannot wave; but the Rent being averred more than the Land, this being no surrender till the other accepts it; this is not altered by notice, waver, or assignment, and so not like the other cases, but like 2 Cr. 549. Maule; and debet & detinet was held good after Verdict, or in detinet only, after assignment, on intendment that the Rent is more than the Land. Sed adjornatur, whether it lie thus or not.

Dominus Rex and Barker.

(52) Religion.

Williams excepted to Conviction upon an Information upon 13. Car. 2. Cap. 1. for Preaching Sedition, the 13th of Octob. 13 Car. 2. and Commission taken out, which was above 6 Months after, and before that the prosecution can be said begun; sed Curia contra, the bringing the party before the Justices of the Peace, and his taking Recognizance is a prosecution. 2. Another Conviction is on 1 Eliz. Cap. 2. §. 11. which hath the same Judgment of Fine, Imprisonment and Disability, which cannot be. Sed adjornatur. For, 3. Though the words were before the Act of Pardon, yet the Conviction is not thereby Pardoned, being not pleaded.

Parsons *and* Parish.

(53) Traverse.

In Trespass the Defendant alledged seisin by the lessee for Three lives, and that they as servants entred; the Plaintiff replies, that before seisin of the lessee for three lives, there was a lease made for 99 Years, for life of one Weeks, under whom he claimed; to which the Defendant demurred, on 6 Co. Helliars case, because the later seisin alledged in the lessee for three lives is not traverst or confest; sed per Curiam its confest by saying that before the seisin of the lessee for three lives, the Plaintiff had a lease for Years; and Judgment for the Plaintiff, Nisi.

Sims *and* Collier.

(54) Slander.

In Action for saying the Plaintiff was Perjured in the highest Degree; the Defendant justified for that the Plaintiff was Church-Warden, and Sworn to present such as come not to Church, and that several (not naming any person certain) did not come to Church, and yet the Plaintiff did

not present them; to which the Plaintiff demurred, because no person certain is named; & per Curiam this is ill. 2. The Court inclined strongly that this is but a Promissory Oath, and so no sufficient justification, because Perjury cannot be thereon.

Palmer *and* Taylor.

(55) Usury. IN debt the Defendant pleads the Statute of Usury ill, as 3 Cr. 245. reciting it to be at the Parliament held the 25th of April 17. Car. 2. and concludes Sic void and corrupt, contra form. Stat. prædict. to which the Plaintiff demurred; & per Curiam by this particular conclusion the plea is ill, though it be a general Statute; but had the conclusion been contra formam Statuti generally, it were well enough; and Judgment for the Plaintiff, Nisi.

Knightbridge *and* Lindsey.

(56) Trespass. IN Trespass of Assault, Battery and Wounding the Defendant pleads not guilty as to vi & armis seu quicquid qd' est contra pacē; and as to the rest, justified in defence of his Orchard, quod molliter manus imposuit; to which the Plaintiff demurred; & per Curiam its ill: but had it been molliter manus imposuit, and that the Plaintiff resisted, and thereupon the Defendant wounded him, it were well, if wounding may be in defence of an Orchard; but it hath been resolved that molliter manus; &c. the Defendant took up Stones and threw at the Plaintiff in defence of his Quarry, was no sufficient justification; and Judgment for the Plaintiff, Nisi.

Dominus Rex and Kersey. *Saturday*, May 15.

(57) Measure. WAllop excepted to the Information upon 22 Car. 2. Cap. 8. for selling by a Bushel not agreeable to the Statute in Farnham, not saying it was above or under Eight Gallons; sed non allocatur, for whether over or under, its an offence, and being after Verdict, its well enough. But, 2. There being a particular proceeding to be before Justices below, no Information lieth here; which the Court agreed on Bakers case, and Castles case; yet Judgment for the Plaintiff, Nisi, being no Negative words.

Dicer

Dicer *and* Stanton.

TReſpaſs of carrying away ſo many Cart-load of Wood; on Verdict for the Plaintiff, and 1 s. damages, Polixphen prayed full coſts, this being not within the Statute Carectat' Ligni, being Wood cut, and the Statute extends only to Treſpaſſes where the Title may come in queſtion, as Clauſum fregit, &c. or for cutting Wood, &c. But in Ogwood and Holder, Treſpaſs for taking away a Sheep, full coſts were given; whereof the Record was ſhewed. Sed adjornatur. (58) Coſts.

Boult *and* Harris. *Monday*, May 17.

IN a quantum meruit pro diverſis bonis & Merchandizis prius accomodat' & vend. the Defendant promiſed to pay; after Verdict it was excepted in arreſt of Judgment that this was too general, as 1 Cr. 573. Canway; ſed non allocatur; the general courſe being to declare ſo; and for divers Houſes building is good, & indebitatus, the reaſon is the ſame in both Caſes, the particulars lying in the Plaintiffs knowledge; and Judgment for the Plaintiff: & quantum habere meruit, is as good as quantum valerent in debit' pro vino & mercimon' not ſaid vend. yet held good this being ſufficient to ſhew the contract on which the Action is grounded. (59) Aſſumpſit.

Howard *and* Withe. Ante.

LEvins on 1 Cr. Barker and Taylor, prayed Judgment, the Verdict finding there were clare media proficua prout the Plaintiff alledges; ſed non allocatur, for this is no Iſſue on paiment, but on the clear profits, as the Plaintiff alledged; and he hath alledged none, but only that there were media proficua; and Judgment Reverſed on prayer for expedition, ſeeing the Opinion of the Court. (60) Condition.

Cole *and* Searle.

DEbt on 2 Ed. 6. Cap. 13. for Tithes of Whittles: St. Maries and St. Andrews on two non debets pleaded, Verdict quoad partem non debet, and as to 40 l. reſidue, debet; (61) Tythes.

debet; which by Holt in arrest of Judgment on 2 Cr. 653. Creswell and Middletons case, is ill. And by Hales Chief Justice quoad 21 l. nil debet, & quoad 40 l. residue, another plea, and so non debet is several Issues, and therefore its ill; which the Court agreed. Sed adjornatur.

Dominus Rex and Viner, *Lord Mayor of* London. Ante.

(62) Jurisdiction. ON Return that the Wife of Emerton was not in his custody, which was sworn false by three Affidavits; the Court upon Gardners case, 3 Cr. 821. conceived that the Return in the Habeas Corpus is traversible by party Interest pro Domino Rege, though there be no Plaintiff and Defendant, and more they cannot do, nor would order Viner, being Lord Mayor, to attend, because a Return was made, as they do when none is made, nor would they make him Swear his Return, as by Twisden hath been done; and the Court left it to Emerton to traverse, or go into the Parliament now sitting.

DE

DE
Termino Trintatis

27 *Car.* II. in *B. R.* Anno 1675.

Friday June. 4.

Hale Ch. J. & *Rainsford*
Twisden. & *Wild.*

Jacobs *and* Searle.

EX motione, Symson for London in debt on Obligation, which the Plaintiff opposed, because time was out; for the fact being that on Trial in London, the Evidence on Cognovit factum, and an Inquiratur de debito was of paiment to Hare the Scrivener, whereas the Plaintiff always kept the Bond, & per Curiam, paiment to Scrivener is sufficient, especially if he have the Bond in his custody; not else, but this Recovery in London depending on the Custom, being difficult they gave time to plead to the end of the Term, part being so paid to the Scrivenor, though the Plaintiff had the Bond. (1) London.

Cole *and* Searle. Ante.

SAnders prayed Judgment in Verdict as to 22 l. debet, and the declaration was for Tithes in two several Parishes, and Nil debet pleaded severally; to which Twisden inclined, but per Curiam these are several Issues, which is uncertain, and in 1 Cr. there was only one Issue; but here its as (2) Tythes.

as in debt on Lease of Free and Copy, on Nil debet it cannot appear to which; and its not amendable, but this being a plain fault in the Verdict, and not in pleading Sanders prayed a Ven. Fa. de novo, which the Court granted. It was bought in both, because it was uncertain in which of the two Parishes the Tithes were; but the Plaintiff had the Interest of both Parishes under the several Impropriators J. S. and Lady Portland, and being for Predial Tithes, it must appear in which Parish the Tithes lie, else Verdict will be against the Plaintiff on several Nil Debets pleaded, which the Plaintiff cannot hinder, being not Impropriator of both Parishes himself.

Stafford *and* Rowe. Ante.

(2) Trespass. IN Trespass Qu. Domum fregit, casting Durt, and taking away Timber and Deal Boards; on Not Guilty found as to the breaking the House, and Guilty for the rest. Girdler prayed full costs, this being now out of the late Statute; 22 & 23 Car. 2. Cap. 9. to this the Court inclined. Sed adjornatur, till advice with C. B. who its said gave full Costs.

(3) Leases. WIthens Excepted in arrest of Judgment for saying the Defendant kept the greatest Baudyhouse in England, without averment that any was in England, sed non allocatur, this needing no averment, as where its said as great as in D.

Ridley *and* Founel. *Saturday*, June 5.

(4) Slander. ACtion upon the Case of disturbance of the Register of of Bristow, in 25 Car. 2. special Verdict on Not Guilty, find the Bishoprick of Bristow founded by H. 8. that the Office is necessary, and granted to one person for three Lives, and that the Bishop granted to Israel Fownel 1 October 1639 for life of Edward, yet alive, and others, after which that Bishop died, and the Successor granted the Office to the Plaintiff; and whether on 1 Eliz. Cap. 19. the Plaintff hath cause of action is doubt. Weston for the Plaintiff, that this grant to Israel binds not the Successor: He admitted an ancient Bishop without confirmation of the Dean and Chapter may grant Office

Office formerly granted so as to bind the Successor, because so at Common-Law the Bishop might have alienedt: And W. 2. Cap. 41. that restrains Abbies, extended not to Bishops, but till 1 Eliz. they might alien by confirmation of Dean and Chapter, but since that Statute cannot act by any Power that ariseth out of his interest, being wholly restrained; and such grants were originally in detriment of the Successor being longer than for life of him that is Officer, therefore are not to be enlarged, but to be confined to usual and ancient Grants only as in pleading title, or for Fees of Office, viz. time out of mind, as Co. the Bishop of Salisburies Case not in the formality of a prescription, but as, Hub. Savage and Day for its foundation to appear ancient and the Evidence to prove such an Office ancient must be the same as to prove a prescription: as 1 Cr. 279. & 555. a Grant 4 Ed. 6. is prima facie an Evidence of an ancient grant, as it is of a prescription till contrary appear: and in 1 Cr. 551. that Office is said grantable time out of mind for two lives, which was the foundation of it: and 1 Cr. Jones 163. Walker and Lambs Case, its said not sufficient that the Office had been formerly granted, unless de tempore in tempus, which must relate to time Immemorial; comprising all time before, and this interpretation is enforced by Co. where the Bishop of Chester its said might grant necessary Office for one life, with reasonable Fee pro concilio, which excludes grant for more lives, or with unreasonable Fee; which ancient Bishops may between the founding of the new Bishopricks, and the grant in Co. was 48 Years, which is not sufficient to denominate grant ancient, so they stand on different reasons from those of ancient Bishopricks. And though 2. as to the Office of Register, this was a Jurisdiction in the Bishops originally, and borrowed to make up the new Bishop, yet here there is no translation as of Boyn to the Abby, where corps remains, or as Co. the Bishop of Norwich Case, where order only is altered and not Corps, no prescriptions are altered, but the Corporation it self here is dissolved; and apply to make a new own as Hospitlers from Templers, where all former prescriptions fail as Dyer, the Dean of Wells Case: Also where part of a Jurisdiction is lopt off, as Ely from Lincoln, and annext to a body in Esse; as in the Case in question, the Bishop of Bristow from Bishop of Salisbury, there can be nothing in Succession of Jurisdiction, there being a Bishop and Register of Salisbury yet continuing, its not found how the Bishop of Bristow comes by his Jurisdiction, so he might have it from Abbies as well as from that Bishop:

Also its found the Grant was to Israel and his Assignees for three lives, and its not found Israel is alive, nor who is Assignee; and there can be no occupant of an Office, so the special Verdict is imperfect as to the Defendant: Pawlet for the Defendant, that unless it appeared Israel were dead it shall be intended he is alive. 2. There is no difference between Grants of Ancient and of Modern Bishops, there being the same cause of both, there must be the same effect; and its clear ancient Bishops did not grant thus by aid of any prescription nor need, as Dyer 114. the Chief Justices do prescribe to make any Grant, but the Grant is good by reason of their Estates in the Office, which is as large as in the ancient, and in Co. had the new Bishops had no other power than the ancient, they would not grant but for their own lives; but its plain they might grant for life of Grantee, and the Statute 1 Eliz. Cap. 19. makes no difference between ancient and new foundations, but the reason of latter Books is only on such Grants as were before 1 Eliz. and not on prescription. 1. This is a good Grant to the Defendant at Common-Law, and on 1 Eliz. 19. it hath been resolved that all Grants within the Purview, and not excepted, are void against Successor; but as to necessary Offices they are within the general rules of all Laws implyed in this Statute, that Grants of all necessary Offices shall bind the Successor; and that may be said necessary, that the Bishops Office obligeth him to do, as to keep Ecclesiastical Courts as a mean to which a Register is of necessity to frame Process, to whom a reward is necessary, and the person that acts in it must be pleased; some of greater value may be but for one life, and others of lesser value may be for three, in recompence to supply the charge of the Fee: also where the Bishop may grant or not, as 1 Cr. 555. where the Grant is pro bono publico, it shall be deemed necessary to prevent delay of Justice to grant in Reversion, especially here being no Fee nor charge to the Successor. 3. As a proof of what is necessary its good Evidence to enquire what is ancient and done before the Statute 1 Eliz. as March Pl. Youngs Case, and had this been other ways than anciently, it would have been found; and this is a private disabling Statute, in nature of a Condition; so the Defendant need only disprove the Plaintiffs Title, and he must Entitle himself by a prescription to grant if necessary. Hales Chief Justice said its plain, that before 1 Eliz. there was no difference between ancient and new erected Bishops, being a grant out of the Estate, which might by confirmation of Dean and Chapter

be

be in Fee, and the prescription not material. 2. In grants by new Bishops its the same; but the great matter is that 1 Eliz. doth not disable grants of Office, not in Pernancy, but created by the Bishop, but these have been restrained as detriment to the Successor, if not necessary or granted for no reasonable time; and the construction since is that what was usually granted before 1 Eliz. for one life shall be so still of such Offices, and if in Reversion, if usual shall be so still, but if not usually granted so before the Statute, they shall not be granted so now, so the measure of these necessary Offices was ad plurima, to that which was done before. 3. The Verdict finds that separalibus temporibus, after Erection of the Bishop they used to grant, which is imperfect; for if it were for three lives or for two lives, and one in Reversion, before 1 Eliz. it shall be so still, and it not appearing how it was granted before 1 Eliz. which was matter of Evidence, it is uncertain; for if it were for mostly but for one life before, it can be for no more now: But 4. though in pleading life must be averred, yet it must be intended to continue in special Verdict, which the Court agreed; and what was done before 1 Eliz. is the true measure of what is to be done since; but being found that separalibus temporibus, since Erection by H. 8. the Bishops have granted for three lives, this may be intended as well to be before 1 Eliz. as since 5 this being parcel of the Jurisdiction of Salisbury, there can be no Successor, because the Corporation and Estate is new, though were the Office in question found to be parcel quoad hoc, he might be Successor, but if always since 1 Eliz. it were granted for three lives, and no grant contrary; its Evidence the Grant was so before, and yet the fact being that before 1 Eliz it was granted to two Conjunctim & Divisim, that expounds separalibus temporibus, and will not warrant a subsequent Grant for three lives. Et adjornatur.

Baxter *and* Dowdswell. Pasch. 27 *Car.* II. Rot. 1052.

(6) Heir. The poynt of a special Verdict was if the Heir of a special Occupant shall inherit by custom of Borough English. And by Hales Chief Justice such Heir is in by discent, and his Grant over shall bind his Heir; its a Freehold discendible where he shall not have Age; nor will discent thereof take away Entry, being no Estate of Inheritance, but the same

as Estate Tail, which Wild, before whom the special Verdict was found, agreed: So Rainsford, so Lands in Tail pur auter vy, whether to Males or Females, who are in by discent Twisden Contra, that the Heir is in by limitation; but being Lord Cooks opinion he would not oppose it. Adjornatur.

Web *and* Bachellor. *Trin.* 26 *Car.* II. Rot. 904.

(12) Way.

TRespass of taking two Horses, the Defendant justified under Surveyors of the Highway, for distress for several defaults of Team, on 2 & 3 Ph. and Mar. Cap. 8. §. special verdict finds the Plaintiff in Holy Orders, and that the Defendants so distrain as alledged without notice to the Plaintiff of their Warrant, or of his defaults, &c. 22 Car. 2. Cap. 12. and whether 1. A person be priviledged from this Statute, was the question. They shall not pay Toll, Pavage, &c. 2 Inst. 4. And 2. the Parson of the Parish is not within the general words of the Statutes, and the keeping of a Team. 3. Unless a man have a Plough-Land is within the Statutes, but not keeping Coach-house. 4. The not having notice nor summon to excuse himself before Justice, but per Curiam, its time enough to shew cause now. Sroud for the Defendant, that person is not exempt in this case, no more than Dr. Rawleighs case 1652 to be exempted from Watch and Ward; which was ruled, he was not priviledged. And by Hales Chief Justice, Parson is not exempted from any new charge for repairing High-ways: And by Hyde Chief Justice P. 5 Car. 1. in his Reports, there is no difference between Clergy and Laity in Assesse for poor maimed Souldiers or B. R. but the Dean and Chapter, and Glebe must pay; and so resolved by all the Judges of England then, and so agreed by all the Judges now, being for Constable Rates, and the like, and the Parson of Bushan in was convicted on this very Statute of Ph. and Mar. for not sending his Cart about 40 Years since, and so the Court conceived here, and 1 Cr. 395. was on other reasons that the Constable is not excused by Warrant; for here as in Case of the Marshalsey, the Officer is not to be punished for executing Process irregularly awarded by Justice of the Peace, the matter being within their Jurisdiction, though the Court where they poceed Inverso ordine will quash their proceedings, but as 14 H. 8. 16. will not punish the Officer, and in C. B. it hath been so resolved

solved. Et adjornatur, as to this point of the Warrant only.

Mayo *and* Coombs. *Pasch.* 26 *Car.* II. Rot. 399.

(24) Baron & Fem.

IN Ejectment of Houses in London by Special Verdict, the Husband was found Tenant for life, Remainder to Feme in Fee, the Husband goes beyond Sea, Feme by Deed Enrolled in the Hustings, seals to the Defendant, after which the Husband returns and enters one house in name of both: the Statute 19. Car. 2. Cap. of rebuilding is found, but that the Defendant had notice before building of the Plaintiffs lessors title. And by Sanders the Entry, and not agreeing to the Fine by the Feme, avoids it; & per Curiam, the Husband doing an act, that alters the presumption, that she was a Feme Sole, and voids the Fine as his appearance barely to a Sc. Fa. Judgment for the Plaintiff, Nisi.

Motteram *and* Jolly. Hill. 26 & 27 *Car.* II. Rot. 988.

(25) Baton & Fem.

COvenant on two Deeds of former Husband of the Defendants Wife, to cutt twelve of the best Trees, whereby the Plaintiff hath Election, and Breach is assigned, that before the time the Defendant cut down some of the Trees, the Defendant saith there were sufficient standing; to which the Plaintiff demurred upon Yelverton Reyny and Alexander. Sanders for the Defendant, by this reservation of twelve of the best Trees the lessee shall not be prevented of his Houseboot; and what is best, as in Heriot is in the Plaintiffs choice; yet per Curiam the Defendant is bound till choice made not to cut any, as on Covenant not to cut any Trees during the Term, or exception of Trees, the Lessee cannot take Boots, unless other Covenants allow them. And Judgment for the Defendant, Nisi.

Andrews

Andrews *and* Uxor *againſt* Rouſe. *Monday*, June 7.

(01) Aſſumpſit.

IN conſideration the Plaintiffs Wife would help the Defendant to the diſcovery of the debts and Eſtate of Sam. Rouſe, who was in debt 16 l. to the Feme dum Sola, and died Inteſtate, the Defendant promiſed, and its not ſaid John the Defendant is Adminiſtrator. So by Symſon in arreſt of Judgment there is no conſideration for this Aſſumpſit to pay the debt: which Hales Chief Juſtice agreed, and that it ſhould be at leaſt that the Defendant intended to take Adminiſtration, and though he had adminiſtration in fact, yet not being alledged, the bare aſſiſtance is no more than to tell where ſuch a Hare ſits, which Rainsford agreed. Et adjornatur.

Counteſs of Portland *and* Andrews.

(11) Covenant.

IN Covenant for not repairing a Houſe let in Surry, being in Decaſu, not ſaid wherein; to which the Defendant demurred, and ſhewed for cauſe that it was not particularly ſet forth wherein it was in decay, which per Curiam is ill, as well as in Waſt. And Judgment for the Defendant, if parties do not agree to amend.

Mulcaly *and* Peny-feather.

(12) Ireland.

ERror of Judgment in B. R. in Ireland, and Execution on Judgment in debt in Inferiour Court of Aeth was that the pleading was in Engliſh 1662, and it was not ſaid where made, which per Curiam being after the Term of the Year is ill, and the Judgment being by nil dicit, but the affirmation is not given, but Sc. Fa. quare execut. non, ſo not removed, &c. the Error is not brought on the Judgment in the Sc. Fa. but on the affirmance which appears not, and Error will not lie from the inferiour Court without the Judgment in B. R. be; & per Curiam the Writ of Error is abated.

Darrell

Darrel *and* Withers.

(13) Tythes.

IN Treſpaſs by Parſon againſt the Vicar, for taking Clovergraſs, juſtified by the Defendant as Vicar, the Court conceived that is due to him that hath the Tyth, Hay and Graſs being no Grain, no more than Saffron. &c. And by Twiſden this hath been often ruled in the Circuit. And the Bar being ill in ſaying he was Vicar, Tempore Captionis & diu ante, not ſaid at the time of Tithes ſet out, and the Replication in new aſſignment, the Court adviſed to mend, and bring the right in queſtion.

Chaplain *and* Skut.

(14) Aſſumpſit.

IN Quantum meruit for 14 l. for work; after Imparlance, the Defendant pleads tender of 7 l. in Court, and that the Plaintiff deſerved no more; to which the Plaintiff demurred, & per Curiam its ill after Imparlance, and being only to ſave coſts, the parties agreed to take the plea paying coſts.

Briton *and* Griffith.

(15) Execution.

EX motione Creamer againſt the Baily of Weſtminſter to return a Writ againſt the Defendant, who being in Priſon by a Warrant from Secretary Coventry for miſdemeanors, the Goaler refuſed to charge him with a Warrant of the Sheriff of Middleſex at the Plaintiffs Suit; the Court conceived that the Goaler cannot diſpute this, though the Court may give leave, or refuſe it, & per Curiam, on pain of 20 l. Mr. Mountague head, Baily was ordered to return the Writ.

Alley *and* Cox.

(16) Arbitriment.

DEbt on Condition to perform an Award; upon no Award pleaded, the Plaintiff ſet it forth being that the Defendant pay; and Releaſes to be generally on diſpute of taking Sheep by Replevin, and breach in non-payment at or in the houſe of a Stranger; to which the Defendant demurred; And Twiſden held this ill, being at or in the Houſe of a Stranger, he cannot come in without being a Treſpaſſer, but

but at or in the House of the party implies a Licence; and this is well enough, but the other Justices held this well enough. And Judgment for the Plaintiff, Nisi.

Bingly *and* Warcop.

(17) Executors.

ON motion for mony out of Court, brought in by the Sheriff, on a Vend. exponas teste before, but after Commission of Bankrupts taken out, the Court said that unless the Goods were seised before the party became a Bankrupt, though they were seised before the Teste of the Commission, yet the Goods are bound by the Bankruptie; but unless the Commissioners shew cause on notice, the Court on 21 Jac. Cap. ordered the money to be delivered to the Plaintiff, and left the Commissioners to Trover against him, but if any had appeared for them, they said the Plaintiff might be put to Sc. Fa. against the Commissioners. See Baily and Bunnings Case

Parker *and* Primate. *Tuseday*, June 8.

(18) Infant.

IN Ejectment on lease of Goods, Hales Chief Justice in direction to the Jury, said that Fine by Infant the Wife of the lessor of the Plaintiff, she living to full age is unavoidable, and if she dies within age is so also, being not avoidable, but by Error during minority; and otherwise many Estates would be shaken: and till the Fine be Reversed, its not avoidable by Evidence of misdemenors in obteining it in Ejectment: And Verdict for the Plaintiff claiming under that deed.

City of London *and* Goree. *Wednesday*, June 9.

(19) London.

IN debt for duty of Scavage granted by Ed. 4. after Imparlance, the Defendant petit auditum of the Patent; to which the Plaintiff demurrs: And by Hales Chief Justice on assignment of variance between the Patent and the Declaration, in the name of the Corporation or any other small variance; the Defendant may have Oyer at any time, but else not after Imparlance: But Adjornatur, this being said the course in B. R. &c.

Dominus

Dominus Rex and Lord Fitzwalter. Ante.

MAynard Excepted in arrest of Judgment, the Visn being of one Will, on prescription to several, that this at Common-Law is ill, Hub. and is not aided by the Statute, being in Case of the King, though as on the Statute of Limitations, if Verdict be for the King it might be aided; but per Curiam the Case is all one at Common-Law, though Jones 320. & 1 Cr. 226. 312. the Statute of Jeoffails extended not to information of free Warren in D. in the Manor of R. where the prescription was for Warren in all the Manor on Ven. Fa. of the Will only; yet by Sir William Scrogs its aided by 16 & 17 Car. 2. Cap. 8. being a remedial Law, in favour of Justice; and Indictments are excepted; therefore what concerns the King only in property or meer profit is included, as on 1 Eliz. Cap. 19. 11 Co. 1. and this exception shews that Indictments had been included, if not excepted: and in Jones 320. the Ven. Fa. was not to go from the Manor and the Will, but only from the Manor, and so doth not fully conclude this case, which the Court agreed: Statutes for quieting possessions of Offices, or in suppression of fraud, bind the King without naming. Hales Chief Justice, the exception as on 18 Eliz. shews the Law-makers thought suits and demands would have included Indictments and Appeals, had the Proviso not been. Rotheram for the Plaintiff, on Roll. 156. & 2 Inst. 681. that the King had no original Prerogative here, as on the Statute of Limitations he had: Also this is to suppress a wrong Mich. 1651 Stiles 307. Theobolds case. Statute that aids Information on Penal Laws, aids all Process thereon; and the Court inclined strongly for the Plaintiff. (20) Fishing.

Dominus Rex and Parsons. Ante. *Thursday*, June 10.

ERror of a Judgment in Oyer and Terminer, by Special Commission, was assigned by Sanders, that it did not appear that the Indictment was within the time limited, by 13 Car. 2. Cap. Sed non allocatur, for this should come on the Defendants part, to plead that he was not sued within the time, or by 21 Jac. on Not Guilty, this might be given in Evidence. 2. The Act is that for Offences not Treason, within the Act no proceeding should be but by Licence of the King (21) Præmunire.

and Council, or by by his Attorny; which Rainsford agreed; but by Hale Chief Justice this should be pleaded, or given in evidence. 3. The Indictment and Trial were the same day, which as 1 Cr. 583. Bensteds Case, may be by the Commissioners of Oyer and Terminer, as in Pontalion Sa's case on Return of the Jury immediate, else not, unless 15 days, unless there be in the Commission nec non Just. of Goal delivery; which the Court agreed: and so in B. R. or Eyre in the same County. Rainsford said he sate on the like this day in Southwark; but Wild Justice, on Stiles 28. pl. 69. said, that of words against the Queen Mother, Indictment and Trial the same day before the Commissions of Oyer and Terminer was Reverst for that Error in Rolls time. Dominus Rex and Place. Adjornatur.

Dominus Rex and L'Estrange.

(22) Forgery. ERror of Judgment in Ireland on the Statute there of Forgery, the same with 5 Eliz. Cap. 9. was Assigned that forging a bare Recognizance is not within the Statute, as if it were in the nature of the Statute Staple, being only before a Master of Chancery there, so 3 Inst. 171. and the Judgment is qd' Statuaretur super Collistrigium, and not ponetur; sed non allocatur, being synonimous; sed per Curiam on Newtons Case, this Recognizance being no Writing Sealed by the Conusor, its not within the Statute, nor is it any Court-Roll, though it be Inrolled in the Court there, that being a term proper for Copihold, not for Records here: and on Bail to appear de novo in B. R. in Ireland; Judgment Reverst.

Dowdswell *and* Baxter. Ante.

(23) Heir. ON Special Verdict in Ejectment found before Justice Wild against his opinion, if the Heir of the Tenant pur auter vie takes as Heir by custom of Borough English. And by Finch for the Plaintiff he shall take by discent on any limitation, and so is in by the custom, for he cannot take as Remainder, the Father having the intire Estate, and may grant or charge it with a lease for Years, nor can the Heir take by designation, because as in case of a Rent, the Heir shall take where there can be no occupant, nor can the Executors in such case; and yet he is as able to take by designation

tion as the Heir, as Yelverton, this was anciently a Fee simple devisable, Bract. 27. & Dyer 253. pl. 99. and though a Remainder on 1 Co. 140 b. Chudlies case may be limited over, yet the descendible quality is not taken away: and in 10 Co. 98. Seymores case, this is said an Estate descendible, and though the Heir shall not be charged with debts, or have not age, no more shall the Uncle, 1 Co. in Shellies case, yet he may be in by discent: and if it were but quasi by discent, its sufficient to be guided by the custom: and on 1 Inst. 110. he prayed Judgment for the Plaintiff. Saunders for the Defendant agreed if the Heir takes by discent, he shall have it by custom, but he conceived the Heir is a purchasor; all the Books say the Heir shall have it: none, but 10 Co. 98. Seymores case, say its descendible, 2 Roll. 151. its said the Executors should take, but 44 Eliz. Fulwoods case adjudged contra: and 18 Ed. 3. 44. Tail to A. for the life of B. is not warranted by the Boook; sed per Curiam its good Law, and it may be intailed, 3 Cr. 804. & 1 Bulstr. 137. its said he shall take by limitation; sed per Curiam whoever takes by limitation, takes by discent, for this can be no contingent Remainder, pro residuo, &c. Maynard for the Defendant conceived this no customary discent, which Warrants only discents of fee, and cannot be annext to an Estate for life, and is only annext to Estates Tail by Act of Parliament; and to this Twisden Justice inclined. But by Hale Chief Justice, Rainsford and Wild its clearly discent according to custom, and the Heir so in; and Judgment for the Plaintiff. Nisi.

Lenthall *and* Lenthall.

(24) Escape.

DEbt on Escape, Special Verdict on nil debet on involuntary escape of Tyler, who after came to Prison in the Fathers time, and so continued, and was let go by the Son; which is the same with Pierce and James, & 1 Roll. 902. Trevilian, being after Hub. 202. Levins prayed Judgment for the Plaintiff, Symson for the Defendant. In Lauson and Butlers case it was ruled that the party may be re-taken after a voluntary escape; but this case goeth a step further to make the then Defendant a Prisoner by coming into Prison again, without the Plaintiffs election or notice of it in the Fathers time; but the Verdict being venit in Prisonam, & fuit in Custodia, is positive, and not only consequence of Law, for he may remain in Execution when he comes again, and its not against Law, and therefore is not subject to the consequence

of Law: and all the former Cases go upon the same Reason, That the Plaintiff hath an interest which is not discharged by the escape; especially here, the Father the then Goaler being dead, and the party else remediless, and the bringing the Action is a sufficient remedy now, otherwise none would be safe after a Year or two Imprisoned; in which time divers private escapes are suffered, and the Goaler shall not take him after a voluntary escape permitted, but the Plaintiff may; which the Court all agreed, and that its not in the power of any Goaler to take away the Plaintiffs interest; and Judgment for the Plaintiff.

Cartwright *and* Pinkney. Hill. 26 & 27 *Car.* II. Rot. 184. Ante.

(25) Rent. DEbt by the Plaintiff the Administrator of Winston, who devised to the Defendant for 20 Years, a Barn and Tithes if W. lived, and for arrears in life of W. the Action is brought; the Defendant pleads former demise by the Dean and Chapter of Lincoln to the Defendant for life, and that he demised to W. for Years if W. so long lived, who after demised to the Defendant, and hereby being of the whole term as he conceived it was surrendred, and so no Rent due; to which the Plaintiff demurred, because the Rent is still due upon the Contract, as upon an Assigment, which though no Rent be incident to the Reversion, yet its in the nature of it a sum paiable for the Land as a Rent, and not as a sum in gross at several days, and not in one; and were this by Indenture it would be clearly good, and its well without, as 2 Cr. 486. Witton and Byes case, where it doth not appear to be by Deed, yet agreed paiable as a Rent, but gone by Release of all demands, which discharged the first Contract; also a Deed would only make it a Rentsecke, no real Contract no more than here. And, 2. The Declaration is of a demise, and though it be a surrender to some intents, yet not as to all. 3. The Defendant sheweth no Deed of his Estate for life. Hale Chief Justice on Mansels case, said that on Assignment of the term reserving Rent by Indenture, it was held no sum in gross: and Hill. 22 Car. 1.

Spachurst and Mynnes case, debt on Assignment of the term by Deed, ruled it lay before the last day, being Rent, and no sum in gross, and agreed that had the Assignment been without Deed, it had been a good Rent; if so, its an Executory Contract, and as an Execution of part it would be apportioned: so

so debt may be for any day arrear; & per Curiam this is a Rent, and the Contract remains; and Judgment for the Plaintiff.

Wigson *and* Garard. Ante.

A Special Verdict find settlement by the predecessor of the Lord of Leicester, 21 Eliz. with power of Revocation by Deed or Will; after which a new Deed is made, 24 Eliz. with new power of Revocation, with Covenant to levy a Fine; after which a Fine is levied to the Earl of Pembrook, &c. in Writing in the presence of Witness; after which the power in both deeds is revoked, and devise made by the Earl of Leicester to the predecessor of the Lord Leigh. Hale Chief Justice said, that Fine after the first deed had extinct the power, and the deed yet effectual; but if the Fine be an Execution of the power; the Earl of Leicester had no Title; but the Plaintiff conceived the Fine and second Deed was but one assurance, and so consequent of the former. Sed adjornatur. (26) Powers.

Dominus Rex and Parker. *Friday*, June 11.

EX motione Sir John Otway for advice of the Court as to new Inquisition, the former quasht being emergit for emersit of Felo de seafter two Years, this being matter concerns the Crown. Hale Chief Justice said that the Coroners Inquest is traversable, which the Court agreed; and though it cannot be now before the Coroner nor Sheriff, 5 Co. 110. b. yet they may take a Commission to Justices of the Peace to inquire, and so traverse it, for though no evidence but for the King can be given to the Coroner or the Justices, yet after the traverse it may, and parties agree to try the same the Assizes next, and so the Body need to be taken up again. (27) Coron.

Courteis *and* Corny *against* Collingwood. Ante.

THE Court having given Judgment for the Plaintiff, would not hear any motion in arrest, though Execution were set aside, being on rule of Judgment, Nisi. But affirmed the former rule. (28) Execution.

Bastard

Baſtard *and* Stukely. Ante.

(29) Legacy. MAſters excepted againſt a Prohibition to Exeter, being after ſentence upon a Teſtament, whereby Goods were deviſed, a moity to the two Executors, and one dying, the other was ſued in the Spiritual Court by the Adminiſtrator of the party deceaſed for his ſhare, becauſe as 7 Co. Kens Caſe, and 4 Co. Buntings Caſe, this is proper to be tried by their Law; ſed per Curiam they having decreed contra to our Law, as on Tithe of Rakings involuntary, or of perſonal Tithes of Gains of profeſſions, this Court will Award a Prohibition; and ſo here, becauſe by our Law the Legacy doth ſurvive; and though the deviſe were of Eight ſeveral parts of the Eſtate, ſeverally divided in the Will, and of Four of thoſe Eight parts to the two Executors, yet Prohibition Awarded.

Sir John Sabins *Caſe.*

(30) Coron. HAle Chief Juſtice ſaid that yeſterday at Guild-Hall, by Niſi prius, a Trial was to be had before him of a criminal for having two Wives; but the Jury not being full, no Tales could be granted, and being late in the day, and for life and death, and not uſually ſo tried, he then refuſed to do it by Niſi prius; ſed per Curiam ſuch Trial may be, and is good, and the Defendant June 15. pleaded the Act of Pardon.

Rowe *againſt* Williamſon. Hill. 25 & 26 *Car.* II. Rot. 719.

(31) Leaſe. THE leſſee for three Years makes a leaſe for Five Years in Ejectment to try the Title on Special Verdict, doubting whether the Defendant be guilty for Three or Five Years. Hale Chief Juſtice ſaid that the Leaſe is good only for Three Years, being an Intereſt certain; but if it were by the Tenant for life, &c. contra: but here the Defendant is guilty for no more, elſe the Plaintiff would recover Terminum prædict. which is Five Year, which is not reaſonable, and ſo yeſterday ruled at the Guild-Hall between Jones and Drinkwater; but the Defendant is not eſtopt being a Third perſon, but only between parties, and no Judgment can be to

to recover for Three Years, being not warranted by declaration; & per Curiam the declaration is ill, and the Plaintiff can have no Judgment. Post 498. pl. 55.

Hutchinson *and* Thomas. Ante.

(32) Usury.

DEbt tam quam upon the Statute of Usury, taking 3 s. per week; the Defendant pleads that ante Exhib. Billæ, Ridgley sued the Defendant for the same matter: viz. the first day of Mich. Term, and being both the same day, and no priority appearing on reference to Livesy Secondary, Symson prayed Judgment for the Plaintiff; and by Hale Chief Justice it not appearing on declaration what day the Plaintiffs Bill was exhibited, the Defendant should have shewed what day it was, as on the Statute of limitation, & ante exhib. Billæ, generally is no plea else, especially it appearing they were both exhibited the same day, and the King hath Election. Judgment for the Plaintiff.

City of London *and* Goree. Ante.

(33) London.

IN debt for Scavage granted by Ed. 4. the Defendant after Imparlance having no Oyer of the Patent enters in the Office a petit auditum scripti prædict. to which the Plaintiff demurred, quod placitum prædict. minus sufficiens to bar the Plaintiff; which per Curiam is ill, there being no plea at all, but as on Aid prayer it should be Judgment if he shall have Oyer, which had been a sine Auditu respondeas Ouster. And Hale Chief Justice said Oyer in B. R. after Imparlance is too late, nor is exemplification sufficient where the Patent it self is pleaded; and a repleader was Awarded giving Oyer.

The City of London *and* Decosta.

(34) Merchants.

DEbt for Scavage by two several Declarations brought at the same time against the same Defendant for the same Goods, but one prescription being for duty of alienigenis & Indigenis; the other is from Indigenis only; and the Defendant pleaded one in abatement of the other, and so would answer to neither; & per Curiam the duty being the same, and for the same Goods, its ill; but had it been in one declaration

declaration several ways, it had been well enough. 2. The Plaintiff pleads the Patent of Ed. 4. and shews only as 13 Eliz. Cap. 6. an Exemplification; which per Curiam is ill, and should at least be pleaded as an Exemplification only, or prout per exemplificat. patentium apparet. 3. This Patent of Ed. 4. should be pleaded by way of Confirmation, else the benefit of 7 R. 2. Cap. is lost as to the prescription, and this prescription to have of Aliens and Denizens is as true of either, as of both, and not traversable; and being a new and unreasonable duty as to Denizens, Judgment quod Billa Cassetur, this being but of Aliens for shewing their Goods here to sell.

Syms *and* Selwood *and* Collier. Ante.

(35) Slander.

THE Colloquium being on the Oath of the Church-Wardens, and suit there for non-presentment, the justification is sufficient, as in 4 Co. 18. sed per Curiam Action upon the Case will lie for saying one was Perjured in the Spiritual Court: and this diminution of the Oath in the justification will not qualifie it, as in Bretheridge Case, where the Colloquium was laid in the Declaration; which the Court agreed, and this, and not alledging any in certain that did absent, is ill; and Judgment for the Plaintiff.

Saturday, June 12.

(36) Place.

NOte by Hale Chief Justice that 2 H. 5. Cap. 4. §. 2. is but a direction, and that the Quarter Sessions for Oaths, or Poor in Middlesex, or other County may be held on any day without special custom, which could not be against 25 Ed. 3. Cap. 8. to hold it at day certain: and 14 H. 6. Cap. 4. is only an excuse. 2. None can be assest to ordinary Rates for Land, and also for stock on the same Land, nor for Money, unless at use; the last the Court agreed; but the former Twisden and Rainsford doubted. Wild absent.

Motteram

Motteram *and* Jolly. Ante.

IN Covenant to have Twenty Ashes in Five Years, &c. the Defendant rejoyned that Eight Ashes were cut before the Election; to which the Plaintiff demurred. And by Saunders on grant of a Load out of a Wood, of 100 Acres, or a Load in 20 Years, the Grantor may cut in the mean time, as 5 Co. 25. in Sir Thomas Palmers Case against Cornford, the second resolution. But by Hale Chief Justice, the Cases are not alike, for here it is that the Plaintiff shall Elect 20 the best Trees, therefore the Grantor cannot cut before election, or request made within the time to take them: An Election of Wood is satisfied if any Wood be left; but of the best Trees not, no more than of 20 the best Sheep, the Grantor cannot take any before Election; so where its to be cut by Assignment of the Baily, it cannot be without, unless a request be to the Baily to Assign; and Judgment for the Plaintiff. (37) Covenant.

Boulton *and* Canam. Ante.

DEbt against the Defendant as Executor in debet & detinet, the Defendant not relying on the undervalue, but upon the surrender, its an ill plea; and though it be double, yet this is aided by the Replication, that there were arrears unpaid, and till paied, he cannot receive the surrender: if an Executor doth Administer he cannot wave the Term, but is chargeable in debet & detinet, if the Land be, as its always intended, better than the Rent; but if, as Cordwins Case, it be specially pleaded that the Rent was more, and that he had no Assets: so Caly and Joſceline and Vandenits Case, its good both ways on this difference; and Judgment for the Plaintiff, Nisi. (38) Executors.

Ayers *and* Gillam *and* Uxor.

DEbt on Obligation of Award on nul tiel, the Award is that the Defendant have and hold a Copihold, she had during Widowhood, from Lady-day before the Award to Lady-day Four Year after, &c. Provilo if the Widow the Defendant Marry or surrender within Four Years, to pay to (39) Arbitrement.

the Plaintiff 10 l. per An. breach in Marriage and non-paiment; to which the Defendant demurred, because the Award to have and hold is void, being either forfeiture or ousting the lessor of the license; sed per Curiam its no forfeiture, being no alteration of the property, nor no prejudice to the Lord, being but a Covenant; and if this were a contrivement by Copiholder to have a lease of Four Years, it would be a forfeiture, by reason of the Covin, but not otherwise: and here appearing no fraud, nor what the custom of the Manor is, whether not to lease for above a Year, or not; Judgment for the Plaintiff.

S. Kellington *and* Norton. Ante.

(40) Poor.

TRespass of taking a Cow in Kellingworth: Special Verdict find the place a great Village, only one Church, but that it had distinct Officers of distinct Mills at each end thereof, and that they are charged to the Poor distinctly, in Hill-Cloase and Dutchy-End: and on 12 Car. 2. Cap. 12. if the Plaintiff being an Inhabitant of the Dutchy-End be chargeable to to the Poor of Hill-Cloase for the Defendant. Bigland on 2 Cr. Nichols and Walkers case for the Plaintiff; sed per Curiam here being but one Church, and no Chappel, these will be Officers of that Parish, for without the Chappel there can be no custom for the Parish in reputation; but the Statute like that of the general Issue doth in this alter the Law before. But this being 2. found Magna Parochia, and not that they are so large as not to have benefit by the Statute 43 Eliz. Cap. 2. in which Case it hath been adjudged between Bonner and Wilson in C. B. Four Years since on Special Verdict for Cambden in Glocestershire, that such Mills were not within this Statute; and to this the Court agreed. 3. The Defendants are found Overseers of the whole Parish: and so though the Justices have not prosecuted the Act, yet the Officers are not to blame, having done according to the Warrant. 4. The Statute intended to help great Parishes, only in respect of extent, not in respect of the number of Inhabitants. Et Adjornatur.

Wilson

Wilson *and* Ash.

EJectment on a lease of Barber of Land in Darby, special Verdict find William B. seised, and devised the reversion and all Messuages, except living in D. to the Heirs of the devisor, and that Thomas B. was Brother and Heir, and entred, and leased to the Plaintiff till the Defendant ejected, and have found no Title for the Defendant; the intent was whether one Messuage being before the devise to Thomas B. for life, he shall take any thing by implication in this devise, but being no Title for the Defendant, nor of what Lands this Ejectment was: viz. that it was not of that devised before, the Verdict is imperfect; and otherwise the Plaintiff must have had Judgment upon the prior possession; also its said Intravit, but doth not say he expulsed the possessor, so the lease to the Plaintiff not good: as on pleading suspension of Rent Intravit gains no possession without expulsion; but the parties agreed to a new Trial. (41) Devise.

Drew *and* Baily. Ante.

HAle Chief Justice said there was little difficulty but that the Administrator shall have this Rent, being reserved to him, his Executors, &c. and Covenant to pay it, like where the Husband leaseth, part of the term of Reversion that goeth to the Wife, but no Rent; or on lease by one Joynt-tenant, the Rent will not survive. But by Twisden its gone. West for the Defendant in debt on Obligation on Covenant to pay Rent by the Executor, for Rent due after the death of the Administrator, this being a Rent service the Executor cannot have it, though specially reserved to the Executors, being all one as if reserved during the term, the Executors in both Cases being strangers, Lit. Sect. 346. is to the Estate of the Reversion, not to the person of the Reversioner, 1 Inst. 214. on lease by Joynt-tenants, without Indenture, rendring Rent to one, it shall go to both, as 2 Ed. 4. 5. tenend' de capitalibus Dominis, is no tenure: and 2 Ed. 4. 11. is the very Case as here, that if the whole term be granted, there is no distress, but on grant of part there is a Reversion, and he may distrain; the Court agreed here is a Reversion, but the Executors come in paramount it; but by West this Rent will pass by grant of the Reversion, and so it would not do (42) Rents.

in 1 Inſt. 46. in Blackſton and Heaps Caſe, unleſs Feme were made party to the leaſe by Deed its a Rent ſeck, and the Avowry follows the right in the Land, not the Contract; alſo if the Executor have this Rent, the Tenant may be doubly charged to him, and the Adminiſtrator de bonis non of the Adminiſtrator the leſſor; ſed per Curiam the Adminiſtrator de bonis non cannot bring debt in detinet, but in the debet & detinet as upon the Contract only, and ſo reſolved Hut. 79. Townly and Steels Caſe. Sarjeant Stroud for the Plaintiff agreed the reſidue of the Term goeth to the Adminaſtrator de bonis non, being no Reverſion, but the old Term; ſed per Curiam its a Reverſion, becauſe the Rent reſerved is diſtrainable of common right. But, 2. by Stroud this Rent is not incident to it, the Adminiſtrator de bonis non coming in above the reſervation of the Adminiſtratrix Suſan Davy, as 10 Co. 127. & 2 Cr. 309. where leſſee died after the Rent day, and before the day of paiment, the Heir ſhall have the Rent, but not the Adminiſtrator: ſo of a leaſe by Joyntenant for life, Dyer pl. or in fee, 8 Co. 96. Shellies Caſe; alſo upon 1 Inſt. 46. the Wife was no party to the leaſe: and Latch. 256. Cole and Sury, and when the Executor of the Adminiſtrator hath received the Rent, he is chargeable as the Executor de ſon tort; which the Court agreed. Hale Chief Juſtice agreed on 1 Cr. Cleve and Vere, that had the extent been executed by the Executor, the Adminiſtrator de bonis non ſhould have it, being a Chattel veſted in right of the firſt Teſtator: ſo where the Adminiſtrator recovers a Term in truſt on Decree in Chancery, and hath it executed to him; but here the Adminiſtrator that was leſſor had a double capacity and right, and the Rent cannot go to the Adminiſtrator de bonis non, becauſe he comes paramount the leaſe, and therefore he cannot execute a former Judgment, but muſt begin a new Action: ſo if the Adminiſtrator ſells a Houſe, the Adminiſtrator de bonis non ſhall not have debt, nor avoid the Contract, but the Adminiſtrators Executor, and the weight of the Caſe is rather whether the Rent be gone, or that it ſhall go to the Executor of the Adminiſtrator: And it ſhall not 2ly, be loſt, but rather ſhall go to the Executor of the Adminiſtrator as Executor de ſon tort, the leaſe being an appropriation of ſo much of the right as Adminiſtrator, as he diſpoſeth by his leaſe: and as to many purpoſes this ſtands divided from that Intereſt; for on this leaſe he hath the Rent as J. S. not as the Adminiſtrator, therefore the Rent doth not ceaſe, but the Law that gave the Adminiſtrator power to leaſe, gives the reſervation continuance as long as the

leaſe

leaſe; had the reſidue of the Term been granted over, the Rent might paſs as incident by attornment: and there is now a Rent in groſs, as in Poph. 145. and Godbolt 279. if Ceſtui que uſe leaſe reſerving Rent, though he had no intereſt in the Land, he might reſerve Rent which ſhould enure to the Feoffees, 8 H 7. but if it belong to Ceſtui que uſe, its not as a Reverſion, but as an Attorny by the Statute made to his Feoffees; which Rainsford agreed; but Twiſden could not difference this Caſe from Joyntenants. Hale Chief Juſtice, the Adminiſtrator had Judgment and Execution againſt J. S. and held he ſhould be diſcharged, being as a pledge only; but if the Adminiſtrator had Mony levied, that ſhould go to the Adminiſtrator de bonis non: and by Rainsford where part of the term is granted, and after ſurrendred to the Adminiſtrator de bonis non, the Rent is gone: and in Woodrof and Cooks Caſe, A. made a fraudulent conveyance to B. then leaſt to C. rendring Rent, which was ſuppoſed good againſt the fraudulent conveyance, and held that the Rent ſhall go to him that had the fraudulent conveyance by 27 Eliz. Cap. 4. elſe he ſhould loſe all, for no Rent can be paid to the leſſor, becauſe he hath paſſed all to B. which the Court agreed by vertue of the Act of Parliament; but the Joyntenant hath only his own ſingle capacity, and leaſeth no more; but in this caſe the Adminiſtrator doth, and thereby gains ſo much of the Term in another capacity, as appears by the different ſuing in detinet only, or in debet & detinet; and if the Adminiſtrator had Aſſigned all, rendring Rent, this would go according to the reſervation by the Contract. And Twiſden ſaid he could not anſwer the Caſe of Baron & Feme; and if the Huſband after leaſe of part of the Term, had granted the reſidue, the Rent had paſſed as incident: ſo on leaſe by a perſon reſerving Rent to him and his Heirs, by reaſon of his Reverſion, will preſerve it as a Rent ſervice, though it cannot go to the Succeſſor with the Reverſion, but while they continue poſſeſſed in auter Droit, ſo long its incident to the Reverſion and no longer; Judgment for the Plaintiff, Niſi.

Forde *and* Arnold. Ante. *Monday*, June 14.

IN debt on Obligation, Condition to pay quarterly ſo long as the Defendant continues the occupation of the Land; the Defendant ſhews paiment until the 24th of June, before which day one Plaintiff entred in quartam partem, and brought Ejectment in Trinity, and had Judgment in Michaelmas Term, &c. to which the Plaintiff demurred, becauſe its not (43) Condition.

not shewed that the Defendant was expelled, or that any Execution was sued: But by Twisden and Rainsford the Entry shall be intended continuing, and there can be no apportionment upon the Bond, as there might be on a Lease at will, &c. And Judgment for the Defendant.

Baxter *and* Doudswell. Ante 486. pl. 23. *Tuesday*, June 15.

(44) Heir. IN Ejectment, Special Verdict find that the Bishop of London Least to R. D. and his Heirs for life of three Sons, whereof one is Lessor of the Plaintiff, of Lands parcel of Manor of Bushey, of Borough English Tenure; that the Youngest Son entred, and the Defendant entred on him: And Maynard for the Defendant, agreed he is not in by way of Remainder, nor as Roll. on Dy. 328. it being adjudged otherwise, 3 Cr. 804. but he relied on this, that custom being to descend to the Heir, it shall rather be intended the Heir at Common-Law than by the Custom, which goeth not to Estates for lives, but to the Inheritance, Estates for life being not discendable, for if the custom were inherent in the Land, the Heir would have it in Borough-English without limitation of the Heir, as 2 Roll. youngest Son cannot take Entail for life of J. S. so its not meerly by discent nor by Purchase; and its only the limitation of the party that gives the Estate in Borough-English, not the Custom, nor hath it any advantage or disadvantage of discent, as to have age, Parol demur, or to be Assets: and Trin. 9 Jac. Brooks Case, Bowls and Poor, Rent granted to A. and B. and Heirs of A. pur auter vy, A. died leaving a Daughter, who after death of B. avowed saying Venit to the Daughter after death of B. not Discendit, which was ruled good enough, being an improper discent; and in Chudlies Case, half blood of Tenant pur auter vy, to him and his Heirs shall have no Fratris possessio, so neither in creation, charge, benefits nor pleading, Heir is not extended to such, especially Customs being taking strictly, as Custom to discend to Younger Son, Warrants it not to the Brother: Also in Conveyance of Inheritance, priviledges and charges discended to customary Heir, as Dyer pl. but not so of Estates for life, 3 Co. Boroughs Case, or special Occupancy, as on Mortgage on payment by Heir, the Elder Brother must pay the mony, and shall have Land; though Borough-English, Pl. Com. 28. Rast. tit. custom, the pleading is de Tenura de Gavelkind, alledging special pre-

prescription to be departible, and that Lands are Fee. So 5 Ed. 4. 1. against Inst. and if this Estate were discendible, it should go to the Heirs of the Alienee, and it need not be pleaded he is Heir: Also 2. its only found these Tenements are de Tenura de Borough English, and not as in Kent or Borough said that the Manor or Fee 2 Ed. Ed. 3. 12 & 5 Ed. 3. 64. & 9 Ed. 3. 27. 23 Ass. 12. and 8 Ed. 3. is such, which makes it Law of the Place, but 39 Ed. 3. 2. of certain Tenements in a Will, which is void, and there can be no such Custom of 17 Ed. 3. 48. Freehold-lands generally; 1 Inst. 110. is an Extrajudicial opinion: and this question never came in Judgment before, and such a discent takes away no Entry: and its meer necessity makes an Occupant. Hales Chief Justice, Lands given to A. and B. and Heirs of A. if B. survives, its Venit or Discendit; for the party may have Sc. Fa. or Intrusion, though a Case of a Fee-simple, and though custom cannot be alledged, but in a Fee or in a Borough, and not in a Bare Tenement, unless said parcel of the Fee, that is so by way of pleading; yet this is a special Verdict, which conveys all Intendments necessary to its discent, so pleading ancient Demsn must say of what Manor; but special Verdict will intend it so, and so that Lands are partitæ & partibiles, as its necessary to support it. 2. Though this discent take not away Entry, nor there be no possessio fratris, yet the Heir is as much in by discent here as of Inheritance, but is of less priviledge as a Term is than a Freehold, 14 Ed. 4. A Custom may extend to an Estate for life, as well as to Entails of Copihold, which are but particular Estates, yet are governed by Custom: and special Heir shall take, and its impossible the Heir can here take any other way than by discent, else there would be no difference between the Heir and Executors. Twisden relied on 1 Inst. as a setled opinion equivalent to Fitzh. or Dr. and Student. Rainsford relied on 10 Co. Seymors Case, where Bargainee of Tenant in tail hath Estate for life of Tenant in tail, and the Heir shall take by discent, and Wife be endowed. Judgment for the Plaintiff; and though consuetudo non trahitur in consequentiam, that is beyond the custom; yet within it may, and this is not devisable, though otherwise resolved in Chancery in James's and Drapers Case.

Hodgkins

Hodgkins *and* Thornbury.

(45) Rents.

IN debt by Executor for Rent, the Defendant pleads Entry by the Plaintiff into back ground, and before no Rent arrear: the Plaintiff replies that before his Entry the Defendant assigned to B. an under lease for part of the Term, which B. let to the Plaintiff: To which the Defendant rejoyns, and Traverseth the Plaintiffs Entry by under Lease of part, and on Extinguishment Br. 48. & 4 Co. 53. b. Rawlins Case, Polyxphen conceived for the Defendant this an extinguishment for the whole. Hales Ch. Just. said the Condition was suspended, because the lessor would else against his acceptance avoid his own Lease, but not the Rent wholly; had the lessor taken back any part for the whole term it would be apportioned, but there can be no apportionment here, nor is there any suspension, for the lessor may discount for Rent of that part whereof he is lessee of part to his Tenant: And the Rule in Ascues Case 9 Co. 134. is too hard for an Entry by consent into a Chamber, Pigsty, Stable, or if lessor incloseth a Court, or sets up a Rick, would thus be a suspention, which would make strange work in London, and against 7 Co. 23. it hath an hundred times in evidence been allowed on nil debet, or expulit & amovit to prove Entry by consent to avoid the suspention; re-taking part of the term, or at will is neither suspention nor apportionment, because Revertion still remains; which the Court agreed: And the constant course hath been to demand, contra to 2 Cr. Smith and Manning, the proportionable part where it is apportioned, or to declare generally and leave it to the Jury, or this may be pleaded in Bar as a surrender of part, &c. but nil Debet is the safest Plea to the whole. Sed Adjornatur.

Harpool *and* Kent.

(46) Patents.

ERror of Judgment in B. R. in affirmance of Judgment in C. B. in Ireland for the Plaintiff on Special Verdict, and that R. H. the Grandfather seised of Knights service, was 17 July 15 Car. 2. licenced by this King to alien to A. and B. to use of himself in tail, Remainder to his Brother, &c. and A. and B. &c. to alien in Fee to the use of R. H. and in 15 Car. 2. the same Year R. H. levied a Fine; and A. and B. recovered against him, and by Tripartite Indenture the use of Fine and Recovery was to R. H. for life;

William

Will. his Son for life, and so in tail Co. 1 &c. to all the Sons, then to Alexander H. and his Heirs Males; the Lands were seised on Rebellion, 23 Octob. 1641. as forfeited and vested in the King by Statute in Ireland, provided to save Innocent. R. H. was found Nocents, And William H. the Plaintiffs Father a Nocent, but R. H. the now Plaintiff an Innocent, and restored The Statute 17 Cr. 2. Cap. was found, and that since Sir George had a Patent saving this Decree. And 1. if the use shall be guided by the licence of alienation, or by the Tripartite deed. 2. If the Lands be vested in the King destroying and discharged of this Remainder, the Court conceived the uses cannot be directed by the licence being out of Term, and only Power to alien. 2. The contingent Remainder is not destroyed, 8 Co. 43. by the Retrospect of this Act of Parliament as it might if made at that time. Apleton for the Plaintiff, that Williams Estate for life was not so wound by discent, as 11 Co. Lewis Bowels Case, being no act of the party that united the Estates, 1 Inst. 130. 1 Co. 101. they shall open to let in contingent Remainder. 2. The sequestration doth not destroy the Remainder, being but a bare possession in the King, no Attainder appearing. 3. The Remainder shall not be destroyed by relation of the acts of settlement being saved by Proviso as Innocent, and having an Estate at the time of the Act of Attainders. 1 Inst. 390. relate only to avoid charges, not to avoid precedent Estates and before Office, Pl. Com. 488. Entry of Disseisee is not taken away by Attainder of Disseisor. Co. Butler and Bakers Case, and in Co. 54. Rector of Chedington, Remainder shall not be lost by Infants refusal at full age, &c. Relations shall not destroy Estates setled by fiction, being no words to be forfeited, as if Office were in 1641. or forfeited to all intents and purposes; and the King is here to have no advantage of these Lands as in case of a Common Attainder, but is to be a Common Trustee to the uses of the Act: one of the principal, whereof was restoring Innocents; for his rights of the Crown are farther specially saved. This Act 3. is tyed up to a particular intent, therefore shall not be expounded to any other, much less to a contrary intent. 2. Admitting the Plaintiffs Estate destroyed by the Relation, yet its saved by the Proviso Car. 2. Cap. §. the Plaintiff being Innocent, and having an Estate in Esse at the time of the act; the very Estates of Nocents do not relate to 1641. to make Estate contingent as it was then, and there were few Nocents in 1641. but since, and Papists and Innocents are joyned together, and must be intended of

such any time since: Also other Provisoes explain this intention for exempting Dublin: and §. of Protestants, though the relief of Protestants was intended as great as of Papists, yet the difference of the Provisoes is that Protestants comprehends all not Rebels before 1663, but for Papists it is restrictive to Innocents, so the Estates were left more large as to Papists: also the Proviso in the explanation Car. 2. Cap. §. doth ascertain those Innocents that are so adjudged by Commissioners, which is sufficient Evidence, and now Estops all to say contra; and the saving §. is but of ancient rights, not of any titles given by these Acts: also the Patent under which the Defendant claims by subsequent Decrees of Commissioners, is no more a title from the King than the Plaintiffs, which is by the like Decree without saving to the Patentee, and recital in the Patent will not amount to a saving, being contrary to the decree, and is only Evidence otherwise: and Infants not in Esse in 1641 were saved as Innocents by constant rule of the Commissioners. Polyx, hen for the Plaintiff, in the Writ of Error the decree is not material, leaving parties to the Law. 2. The Kings being Trustee is not material, nothing of restitution being intended. 3. He relied upon 17 Car. 1. Cap. that vests all the Lands of Rebels in the King, saving rights 23 Octob. 1641 other than Rebels, &c. A. Tenant for life, Remainder for life, Remainder in Tail to B. Remainder in Fee to A. by death of B. the Estate for life is drowned, and Pl. Com. 26. and 1 Inst. 298. Contingent destroyed to prevent fraud of secret Estates against 11 Co. which comes not to the cases where the particular Estates are in Esse, and Feoffment 1 Co. 130. destroys it, the Privity being gone, the accrewer is destroyed, 3 Cr. 630. Smith and Bellay, 1 Cr. 102. Bigot and Smith, yet here might a Right be intended in the Feme, 1 Co. 66. Archers case, determination in Fact or in Law, before contingent haps makes Remainder void. 2. Supposing particular Estate in Esse that might support Remainder, yet by 17 Car. 1. Cap. being vested in the King none could be seised to revive the use to lessor of the Plaintiff, born 1659 as in Moor 374. pl. Perrots Case. 3. Being at Common-Law, nothing in the Acts will revive or restore it, unless within the savings; the Plaintiff was not then born, nor could be included within the body of the Act. Rainsford Commissioner at this decree, left the Titles to the determination of Law, and upon the special Verdict doth not appear these Lands are parcel of those vested in the Crown by 17 Car. 1 Cap. for if they were; the nocency of Grandfather, and Father would quite

quite confound all Estates together, as Sir Thomas Palmers Case which was by covenant to stand seised to himself, Son, &c. and ruled that by Attainder of Father and of Son, the Contingent Remainder was destroyed; but this was to arise out of the Estate of the Covenantor, here out of the Estate of the Recoverers; but both by Hales Chief Justice agreed in this, that all is Consolidate in the Crown: and had Grandfather and the Father levied a Fine, the Remainder had been destroyed, and 17 Car 1. Cap. lodging all in the Crown hath done as much, and so discharge all suings and Retrospects, for being once extinct will not be revived by Retrospect: No subsequent act of Surrender merger or forfeiture will destroy the contingent while the particular Estate continues, but when that is gone before the contingent happens, in this case singly, the Remainder is destroyed; were there no saving the Retrospect might intend to destroy all Estates, but these shew contrary, for this might be such a right, if it were not lost by discent to the particular Estate, that might be preserved, though only contingent, but it intended not to save any Conveiance under Nocents, which the Court agreed. Sed adjornatur.

Harris *and* Harris. *Wednesday*, June 16. Trin. 26 *Car.* II. Rot. 1660.

ERror of Judgment in Barstable, in debt for an Annuity brought after Lease ended against the Executor on a deed Infra of Rent payable Infra out of Lands, not said Infra. Syderfield prayed Judgment on 1 Cr. 570. Ireland and Blockwell; this being now as an Annuity, and so where the Land is it cannot be material: But by Twisden and Rainsford, this cannot be made Annuity after the Term ended, and therefore the Land must be said Infra, unless in Writ of Annuity. 2. The demand was for 11 Years 5 Months and three Weeks on agreement on death of lessee, between the Rent day of Lady-day and Michaelmas, to pay pro rata, and the lessee dying 3d. of April the declaration is for more than appears due, which the Court agreed Error, but might after Verdict be releast for the overplus before Judgment. And Judgment Reversed. (74) Lien.

Andrews *and* Simons.

(48) Church. ON Libel in Spiritual-Court on custom of St. Walbrook in London, that the Church-wardens have used by reason of repairing the body of the Church to take Burial fee four Nobles, and of him that asks for strangers, double; Mr. Attorny played Prohibition upon denial of the Custom there in Spiritual-Court, though the original cause belong to them, & per Curiam, granted, Nisi.

Dominus Rex and Viner. Ante. *Thursday*, June 17.

(49) Imprisonment. THe Court refused to grant Capias against the Lord Mayor, after three rules to attend, but advised to Indict him for false Return, or bring action de uxore abducta cum bonis viri: but by Sir William Scrogs yesterday in Exchequer on two hours debate they refused to charge him as Officer there, by reason of majoralty, and otherwise they could not charge him, being priviledged as the Kings Jeweller; but the Court gave another rule to attend.

Baygs *and* Upper.

(50) Executors. EX motione Shouldham against the setting aside Judgments had since the action pleaded by the Executor ultra quod he had no Assets, the Court said that Judgments might be pleaded if on actions sooner depending. Also 2. It was unreasonable, Executor should have advantage of Retainer for penalty of the Bond, but on fully Administred. Hales Chief Justice had frequently disallowed it. 3. Its most reasonable that Plea should be allowed, that upon the several Judgments pleaded there is due for Principal and Interest so much; and the Executor hath no Assets ultra, and this course will avoid infinite inconveniencies in pleading to each particular Judgment that was by fraud, where if one be by fraud and another be not tryed, Judgment was here Reversed 1 Roll. 802. §. 6. Motwayes Case, and the true reason was because it was not reasonable to give Judgment against the Executors de bonis Testatoris, because the other Judgments

Judgments might eat up the debt, and notwithstanding 1. Brownl. 49. pl. 268. the Court put the parties to plead the Bonds on which the Judgments were had since the declaration, ultra quod no Assets, or else that the Plaintiff reply, &c. no more is due on residue of the several Judgments, but so much, ultra quod no Assets, &c. at Election.

Dominus Rex and Parsons. Ante.

IT was excepted on Stiles 28. pl. 69. Places Case, that being by Commission of Oyer and Terminer it could not be tryed; but per Curiam in Lord Castlehavens Case there was but eight or nine dayes before the Return of the presentment, and not 15 as it must be unless tryable the same day, yet held good. But the Court agreed that the Justices of the Peace cannot try the same day, though they be called by the Commission Justices of Oyer, by nec non diversas felonias audiendum & terminandum in the same County, but by consent they may try the same day; and for Felonies they always proceeded the same day, but not in Trespass; and B. R. proceeded daily here as Justices of Oyer, and in Eyre in County where they are, which was no more, and this setled per Curiam. 2. One Endictment was An. Regis Car. 2. &c. not said Regni, which per Curiam is well enough. Adjornatur. (51) Coron.

Hodskins *and* Thornbury. Ante.

COppyholder leaseth to B. for 15 Years B. assigns part of the Land to C. for the whole term, C. assigns to Coppyholder: And by Polyxphen this is a suspension upon extinguishment Br. 48. and 9 Co. 134. Ascues Case. 1 Inst. 148. for the whole, because Rent service cannot be suspended in part, 1 Roll. 938. by act of the party, and 4 Co. 54. Rawlins Case: The third resolution before any Entry, Owen 41 the same Case, and 1 Roll. 939. if the Rent were not suspended the condition could not: 1 Co. 97. & 1 174. Digs Case, Entry by Licence where no Estate is taken by lessor from lessee is no extinguishment, as Pl. Com. Parson Honylanes Case, and Dorrel and Andrews Case, 1 Roll. 938. and the reason of this is the same in Equity as extinguishment of Rent charge by Purchase of part of the Land for Inheritance, or suspended if for Years; Sanders for that for Rent there is no remedy, but Assize or Distress, which he cannot have and the Land also; but in the (52) Rents.

Case.

Case in question there is but a bare new contract between lessor and lessee, which shall not determin in the old one, especially while lessee enjoys his Land, as where the lessor of a house takes a Chamber in it by agreement, which would be of dangerous consequence; & per Curiam, the case of a Rent will not be like this, because on release of all the Grantees right in one Acre, his distress is wholly gone; and the scope of Rawlins case, was upon the extinguishment of the condition, being intire, which was taken for granted on the reason of a Seigniory, which was not distinguisht from Lease or Contract there, and its often that part of the House and Garden are reserved on Lease, and new parcel taken in by lessor of the lessee; and in Chancery the Plaintiff here was dismist because he had this remedy at Law. Sed adjornatur.

Ridly *and* Fownel.

(53) Lease. The Court agreed the Bishop may grant new Office if necessary, and if usually granted for more lives, for more, but if before 1 Eliz. it never were granted for three lives, it cannot be so now, and the Separalibus temporibus being so granted as found, is well enough, for it cannot be said always granted for three lives, therefore may be intended all time between, 33 H. 8. Cap. & 1 Eliz. Cap. 19. Sed adjornatur.

Warkhouse *and* Simons. Ante.

(54) Executors. The Declaration in toto se attingit to 38 l. & licet sæpius requisit. the Defendant had not paid prædict. 48 l. per Curiam is ill. 2. The replication mistakes the sum of Quadragint for Quadringent in one of the Judgments pleaded, which per Curiam is ill, but Certiorari on diminution was shewed, whereby all was amended; and though after in nullo est Erratum, it were not grantable at the suit of the party, nor upon an undue amendment, yet the Court on surmise the Record below is right, may send for the Roll into this Court; but being returned the Court would not disallow it, but said it should not be entred on the Roll, but they held both faults amendable below in C. B. Et adjornatur.

Borage

Jennings *and* Hunkin. *Friday*, June 18. Ante.

IN Action upon the Case for calling Perjured Rogue; the Defendant justified by Affidavit in Ejectment of notice in Launceston, the Viſn is brought of Plymouth on Iſſue de ſon tort abſque tali Cauſa, tried in Devonſhire. Maynard the Kings Sarjeant prayed Judgment on 16 & 17 Car. 2. Cap. 8. that the Trial where the Action is laid is ſufficient, though the Iſſue be local on a thing in an other County. Hale Chief Juſtice where the Iſſue is generally on the Declaration it may be aided, but where the Iſſue is on collateral matter it ought to be tried where Iſſue is, and its all one as debt in London upon a demiſe of Lands in Yorkſhire, and entry and ſuſpenſion pleaded in bar, and the Oath and matter thereof ariſing all in Cornwal, its a void trial; but if part were in Devonſhire, as the Oath, and part in Cornwal, as the notice, &c. then the trial in Devonſhire upon this general Iſſue, de ſon tort, is well enough; but here the Ejectment was brought in C. B. and the Oath before Chief Juſtice Vaughan at Launceſton, that it was brought by aſſent of the Plaintiff, but no place of aſſent mentioned, it may be intended where the Action is; and the rather, becauſe this Affidavit is before Vaughan as Chief Juſtice, and not as Juſtice of Aſſize, and therefore though it ſay Jurat' at Launceſton, yet its tranſitory and not local. The parties agreed to amend and lay Oath, and all in Devonſhire; but the Court inclined on local Iſſues ſtrongly, and clear againſt the former Judgments: ſo Oath taken at Weſtminſter, that was at Sarjeants-Inn, is well enough, and the place not material. (59) Slander.

Corporation of Hadley *and* Gayle.

IN debt for Fine ſet on the Defendant an Attorny of this Court refuſing to ſerve as Burgeſs one of 16. Ex motione Sarjeant Hyde to ſet aſide a Rule to plead privilege; after Imparlance the Court conceived that an Attorny hath privilege againſt being choſen to ſuch Office; but bare ſuggeſtion is not a ſufficient diſcharge: but a Writ of privileg being ſhewed before the Action brought for the Fine, per Curiam its a diſcharge, and a good bar in this Action, this being no Fine ſet in the Court of Record, but in the Corporation as an arreſt of the perſon after privilege ſhewed (60) Priviledg.

ed under Seal; but it was conceived that the privilege generally is not pleadable after Imparlance; and the Court left the pleading at the parties discretion.

Dominus Rex and Howel. Ante.

(61) Games. THE Defendant being convicted of keeping a common Cock pit Six days; the Court conceived it an unlawful Game, and took their measures by 33 H. 8. Cap. of 40 s. a day, though the Indictment were at Common Law, and he was Fined 12 l.

——— *against* Jaggard.

(62) Merchants. EX motione Stroud for Judgment for security in the Information for duty of Salt: and in the Exchequer the question was whether on 14 Car. 2. Cap. 11. §. 38. and on 12 Car. 2. Cap. 18. Sect. 16. Salt taken from a Spaniard by a Dutch-man, by Commission from Scotland, and brought into Scotland, and thence to England, shall pay as for Salt brought from Scotland. And by Hale Chief Justice, &c. on Adjournment from the Exchequer-Chamber to Sarjants-Inn, they shall pay as Scotch Salt; but if it had been taken by English Commission, and only put into Scotland, &c. it should pay as English or Foreign Salt; and Judgment accordingly without security.

Wigson *and* Garret. Ante.

(63) Powers. THE single question was if Deed 21 Eliz. with power of Revocation be destroyed or executed by the subsequent Deed, 24 Eliz. with new power of Revocation: viz. Covenant to levy Fine to other uses, without notice of the former Deed, or any express Revocation; and after levying a Fine to the uses of the second Deed of Covenant, 24 Eliz. and if the first Deed be destroyed and revoked its with the Plaintiffs Title, if not, its with the Defendant, or if only the power be destroyed. Newdigate for the Plaintiff, that the same conveyance 1 Co. 110. Albanies case, and 1 Co. 173. Digs case, and 10 Co. 144. Scroops case, may destroy the former uses, and limit new without express Revocation. 2. Though the Deed of Covenant

do

do not destroy the first Deed, but the power of Revocation only is destroyed by the Fine, yet the Defendant hath no Title under the Estate in that first Deed; and the descent is found to the Plaintiff.

Finch for the Defendant a power of Revocation to be by Deed under-hand of A. is not revoked by Covenant to stand seised to other uses, unless the first power had been to revoke and limit it new, or all circumstances be pursued, Hub. 312. Kibbet and Lee, and the Fine alone was no deed within the power, but extinguisheth the power, being to the partys interest in the Land; also the Deed doth not do it, being only a Covenant referring to future Fine: but 10 Co. 143. Scroops case, was a Covenant to stand seised to the present new uses, but this Covenant hath no operation till the Fine levied, and is the first of February, and the Fine craſ. purificat. which per Curiam is precedent: contra if the Fine had been of return in that Term precedent to the first of February: It was further said that the Fine and Deed are but one assurance, and all uses arise out of the Fine, not virtute, but only by direction of the deed: and so Mich. 6. Car. 1. Rot. 1442. in C. B. Ingram and Parker on Power in the deed of Catesby to revoke by deed under-hand, held by Three Judges that Bargain and Sale not Enrolled, and Fine after was no Revocation, but an extinguishment of the power, being the folly of him that made them, that he did not pursue his power, and the deed of Bargain and Sale did as much direct the uses of the Fine as in this Case. But by Hale Chief Justice, the Execution of the Bargain and Sale, though it were not Inrolled is an Execution of the power within 10 Co. 143. Scroops Case, though it were never Inrolled the Fine alone would have been no Revocation; nor if it had been before, the deed of Covenant would have only extinguisht it; also the Covenant alone referring to future deed, would not do it alone; but being here Executed by the Fine altogether, is a good Execution, as the Lady Hastings case, on power to make a Joynture, the Husband Covenanted to stand seised, being but Tenant for life to the use of the Wife for Joynture, yet held a good Execution of the power, it appearing by the deed that the intent was to make a Joynture; and Twisden Justice said the like was adjudged, on Special Verdict at Guild-Hall in an Attornies Case: so Covenant that when A. doth pay 10 s. or when he doth such an act as is not in it self a Revocation, that then it shall be revoked; here its not singly the deed nor paiment, but both that compleat the Revocation: but had the power been to re-

voke by deed Inrolled, the Inrollment might be necessary, but else the bare Sealing is sufficient evidence. And Hale Chief Justice said on great advise, on power to make Leases for lives, it was held it need not be Executed by Livery and Seisin, but by bare Sealing the deed and delivery made the Lease according to the power; and it was questioned in the Lady Rogers Case of Blainfford, whether Livery and Seisin did not do harm, and they conceived there and here that it did do harm, and that the Sealing and delivery alone is sufficient: and Weekly and Spencer, Special Verdict Hill. 1654. in C. B. Rot. 1799. the same point was adjudged as here for the Plaintiff. Sed Adjornatur.

Hinton *and* Cray. *Saturday*, June 19.

(64) Arbitrement. DEbt on Obligation, the Condition to perform an Award to be by Two, and in default by Umpire, by Writing Indented, Sealed, breach in non-paiment; the Defendant after no Award pleaded, rejoyned paiment; to which the Plaintiff demurred; & per Curiam its a departure. 2. It was not said the Umpirage was by Indenture, but only by Script. sigillat. which per Curiam is ill; and the Plaintiff prayed leave to discontinue; which the Court refused, and left them to remedy on the Award; but the Plaintiff agreed not to take penalty of the Bond. And so Adjornatur.

Mercer *and* -----

(65) Condition. DEbt on Obligation, the Defendant pleaded that the Mony therein was the Fine upon a Lease, and to be paid only on performance of other matters therein, to save harmless, &c. and that the Plaintiff had not saved harmless; to which the Plaintiff demurred; & per Curiam its no plea; and Judgment for the Plaintiff, Nisi.

Bowyer *and* Spry.

(66) Error. ERror of Judgment in the Court of Launceston was assigned, that it did not appear to be a Court of Record; sed per Curiam this is admitted by the Writ of Error; also its Curia Domini Regis tent' virtute litterarum patent. which per Curiam is a Court of Record, though under 40 s. being not held before suitors; and Judgment affirmed.

Hony

Hony *and* Daniel *and* Uxor.

(67) Bar. & Fem.

IN debt against Baron and Feme on Devastaverunt bona testatoris; and converting them ad usum ipsorum; to which the Defendant demurred. Twisden held it ill, and Jones 264. pl. 2. so ad usum suum proprium, for after the Marriage the Wife cannot convert. Hale Chief Justice, were it not debt which is grounded on the Contract, and cannot charge the Wife, a Return on Scire Facias that the Baron & Feme wasted, may be intended well enough, that the Husband wasted during the Marriage, and the Feme before, as Jones said 1 Cr. 519. pl. 612. but this cannot raise any debt upon the Wife, though she were the sole Executrix; which the Court agreed. Sed Ajornatur.

Hill *and* Mountague, *Baily of* Westminster.

(68) Escape,

IN Action upon the Case on Escape upon mean Process; the Defendant pleaded a Rescous; to which the Plaintiff demurred, because its no plea, on Moor 852. pl. 1162. & 2 Cr. 419. But 1 Roll. 440. on May and Probies case in Escape Br. 32. Sect. 5. the Court said of later time it hath been constantly held a good plea ever since 6 Car. 1. but here being no Return of any rescue, nor no Averment that there was any Return, made the doubt; and the Court conceived this being Returned, is a good plea: and it need not be averred in the plea that it was Returned; but in debt upon an Escape its no plea; and Judgment for the Defendant, Nisi.

Jenkinson *and* Allenson.

(69) Arbitrement.

DEbt on Obligation to stand to an Award, and breach for non-paiment; to which the Defendant demurred, because the submission is ita quod it be ready to be delivered; and its said to be made, but not said ready to be delivered to the parties, or such as require the same. 2. The Award is not said to be Sealed, but that an Award was made Indentat. cujus alteram partem sigillo arbitratorum the Plaintiff brings into Court; which per Curiam is ill, if the Award be to be under Seal, being no positive averment it was Sealed; but this was ita quod the Award be made in Writing, so the aver-

averment it was made per script. Indent. its sufficient. 3. The not averring it ready to by delivered, is ill, and so 2 Cr. 578. pl. 6. but ready to be delivered at D. is sufficient if left at D. for then its ready. Sed adjornatur.

Darrel *and* Withers. Ante.

(70) Tythes. TRespals of taking away Clover-grals-hay, the Defendant avers he is Vicar, and that it was Tyth of grals which belongeth to the Vicar; the Plaintiff by new assignment replies insufficiently; to which the Defendant demurred. And Sanders for the Plaintiff excepted that its not said the Defendant was Vicar when the Tyths were severed, but only that the Defendant was at that time of the Trespals Vicar of Kings Clere, & diu ante, and that at Trespals the Hay was Tithes of Grals then lately growing, which by Polyxphen for the Defendant is good to a common intent. Hales Chief Justice, Nuper by intendment is after Diu, and so may be intended to over-reach it, that he was Vicar at severance, but this is Traversable, and so should be precisely alledged. Sed adjornatur.

Marrow *and* Billam.

(71) Fees. ACtion upon the Case quantum meruit for Fees as Attorny. 2. An Indebitatus for Money Expendit. & Erogat. to which the Defendant pleads the Statute Jac. and that the Plaintiff shewed no Bill, and non Assumpsit pleaded to the first; to which the Plaintiff demurred, & per Curiam, the latter promise being for Money expended he need not shew Bill: And Judgment for the Plaintiff, and as to another Indebitat. for Fees, the Statute being pleaded all in the same declaration, Judgment for the Defendant, it being as well necessary to shew Bill in action upon the Case as in Debt.

Mercer *and* Brown.

(72) Executors. IN Action upon the Case against the Defendant, as Executor, on consideration that the Testator was indebted in 50 l. whereof 15 l. was unpaid, for a Marriage Portion of his Daughter with the Plaintiff, the Defendant in consideration Inde promised to pay; to which the Defendant demurred: And Judg-

Judgment for the Plaintiff in Ireland, and Error assigned, that here is no sufficient consideration, no Assets being averred, &c. which the Court agreed; and Judgment was Reversed, being no express promise.

Arnold *and* Fort. Ante.

(73) Condition.

COndition to pay to two Men, one whereof is the Defendant, 2 s. a Year so long as the Defendant occupies the Lands; neither said for nor out of those Lands; the Defendant pleads that the Plaintiff after two Rent days encurred, and before the third, had made entry into the fourth part of the Land; to which the Plaintiff demurred, because this is no Rent, and there is no answer given to the other three parts; but per Curiam, were it a Rent, this Entry would be a suspension, and the Entry being on the lessee need not be said Habens Jus: But Judgment for the Plaintiff, Nisi.

Dominus Rex and Brownfield. *Monday,* June 21.

(74) Pardon.

THE Court, Hales Chief Justice absent, conceived that a general Pardon of all Felonies and Burglaris, before 1 Dec. 14 Car. 2. and Utlaries thereon is sufficient, without particular recital of the Indictment, which was mistaken; though Keeling Chief Justice held Contra, and the Pardon was allowed.

Andrews *and* Rous.

(75) Baron & Fem.

INdebitatus by the Plaintiff, & uxor, not said Administratrix or Executrix of the former Husband, on consideration that the Plaintiffs would assist the Defendant in discovery of debts of the Dendants Brother. Jeoferies on 1 Cr. 70. March and Culpeper, prayed Judgment, & per Curiam, though the Defendant be not shewed to be administratrix, yet the Plaintiff is at trouble in assistance: And Judgment for the Plaintiff.

Dominus

Dominus Rex and Pine. *Tuſeday*, June 21.

(76) Trades. SArjeant Stroud excepted to order of Apprentice Girle put upon the Defendant againſt his will, being a Gentleman in Somerſet, upon Steers Caſe . becauſe the Juſtices could not place ſuch an Apprentice: But by Hales Chief Juſtice its dangerous to ſay they cannot, and opinions have been various, but all agree Juſtice may ſet tax towards keeping, &c. but the Court granted a Certiorari to remove it to try the queſtion.

Web *and* Hartfell.

(77) Fees. POlyxphen praied Prohibition to Hampſhire in ſuit by Proctor for Fees: But by Hales Chief Juſtice no action upon the Caſe was ever brought for ſuch Fees, and therefore they may be ſued for in Spiritual Court, but a Prohibition was granted, Niſi.

Dominus Rex againſt Alſop *and* Bently.

(78) Foreſt. FInch prayed Proceſs here on removal of order of Conviction of the Defendants on the Statute 13 Car. 2. Cap. 10. of hunting, which per Curiam ought not to be hence; but is proper only to the Juſtices below, and being only a Certiorai and no Habeas Corpus, and the Conviction irregular, the Court would not remand it, but offered an agreement to try it by action. Et adjornatur.

Hill *againſt* Montague. Ante.

(79) Eſcap. HAles Chief Juſtice ſaid 3 Bulſtr 200 pl. in eſcape Br. 32. it was adjudged Seriatim, that it was a good Plea, ſo 16 Ed. 4. 3. but its no Bar of Execution; but if the party be once in Goal the Sheriff cannot Return a reſcue, 15 Car. 1. but in going to the Goal he may. 2. Though its better to plead a Return whereby the party may go on with Proceſs, yet its good enough without a Return by an averment that he was reſcued, which the Court agreed, and ordered the Return

Return to be made and filed: And Judgment for the Defendant.

Hony *and* Daniel. Ante.

AS to the debt against Baron and Feme on Devastavit, the Judgment in the Action upon the Case against them, being recited quod recuperet Damna de bonis Testatoris, and costs against the Husband de propriis only, so debt on that Judgment lieth not against Baron and Feme for costs and damages; if Feme Executrix wasts and takes Husband, and Devastavit by Husband and Wife be surmised, the Sheriff, as 16 Car. 1. in Roll. 831. may return wast of the Wife alone, and the Husband takes it charged, so 1 Cr. 167. pl. 184. Judgment shall be against Baron and Feme for Trespass Dum sola: Also if Feme Executrix take Husband and he wasts, this shall charge the Wife, as Beaumond and Long 1 Cr. 208. being all one as wast by Baron and Feme Tenants for life, and here Judgment shall be against both, and charge the survivor; but if there be no return of wast against Baron and Feme in life of Wife, the Husband shall not be charged by an Averment: And though this be setled in Cory and Thyns Case, yet its not good to carry this too far, for 3 Cr. Syblies Case was denied there for Law, and 7 Jac. it was held that the Executor is not chargable with the wast, being a trespass that dies with the person, Rolls Rep. for else this would be paid before Legacies, and so the Executor would be at great danger; and this being a step farther than hath yet been, the Court were unwilling to go farther: and in Collins and Browns Case, Ante after Verdict at Guildhall, Judgment for the Defendant, that debt lieth against Executor of an Executor on a Devastavit averred, but contra was this Term adjudged in Exchequer; that Executor of an Executor is chargeable according to the Civil Law; to which Twisden inclined, but Curia contra, that whatever is in Executor is as Executor, but this would make an account infinite. Sed adjornatur.

(80) Baron & Fem.

Hodgskins *and* Thornbury. Ante.

(81) Rents. HAles Chief Justice against 32 H. 8. Extinguishment, Br. 58. agreed that this is no Extinguishment, and as to the third resolution in Rawlins Case, its an admission of that as the foundation; and was not the point of the Case, and 16 Ed. 3. Avowry 116. & 17 Ed. 3. 57. adjudged the Rent is apportionable: but by Thorpe, on Lease of part back to Lessor, that the whole is suspended; but by Shard that gave the rule it shall be apportioned. And if Lessee for 20 years of 20 acres for 20 l. per An. upon surrender of one, the condition is destroyed, yet the Rent shall be apportioned, and in all Cases where Rent is apportioned by act of the party the Condition is gone; and if lessee makes a Lease at Will, who licenceth lessor to occupy, who possesseth it half a Year, that is no Extinguishment, nor is the Will determined. 1 Roll. 939. Dorell. Sed adjornatur.

Dominus Rex and Carefwell.

(82) Measures. IN Information upon 16 Car. 2. Cap. for selling by false Measures, it was excepted by Wallop, that the penalty is to be levied by Justices of Peace, and they to have the Execution of the Act; and so no Information can be in B. R. and 22. Car. 2. Cap. the Court conceived that upon these Statutes, as Bakers Case, and Castles Case, on Information can be in B. R. and Contra formam Statut. is intended against this, unless the Plaintiff can assign some other, for the value is forfeited only by those Statutes, and that is averred though not demanded. Et adjornatur.

Bill *and* Bulstrode.

(83) Fees. WIld Justice said that in C. B. in Web and Blanchers Case an Indebitatus lieth by Attorny, as well for his Fees as for Money expended; but by Hales Chief Justice, though the Law creates such a promise as in real contracts as for Rent, &c. yet not in personal as this for Fees is. Sed adjornatur.

Dominus

Dominus Rex and Lord Fitzwalter. Ante.

WIld Justice was not satisfied with 1 Cr. 311. Jones 320. where the Visn was of neither Place, neither Town nor Manno as it should, and so was not within the Statute 21 Jac. Cap. but especially because 16 & 17 Car. 2. Cap. 8. is word for word with that between the Plaintiff and Defendant, demandant and Tenant: which Hales Chief Justice agreed as to the Action of Quo Warranto, and this Ven. Fa. is mischievous to the King, for the Town-ships near might have better notice than this, and the King as to this action Criminal being not within the Act, its not aided by the Provisoes, and 1 Cr. 144. Tufftons Case was amended by warrant of Mr. Attorny at Comunon-Law, and not aided by the Statute; this is a Prerogative and not a Civil Action, as Quare Impedit, Debt, &c. But Hales Chief Justice said the King was within the Statute, and many Judgments for him will stand in need of the same amendment. Sed adjornatur. (84) Fish.

Dominus Rex and Channel.

HE was Indicted at Westminster Sessions 13 July 1675. for departing from his service, being bound Apprentice, and superinde assigned to Thomson the prosecutor. The case was that the Defendant was bound Apprentice to A. who died; and the Executors of A. by Indenture assigned the Defendant to Thomson for residue of term in three year; to which the Defendant agreed by writing his name and assent upon the Indenture of assignment, and if by all this he were such an Apprentice, as by 5 Eliz. Cap. 4. §. 9. were indictable for his departure from Thomson, was the question: Creamer for the Defendant, Urged 1. that this is an interest, and so was well assignable over by the Executor of A. as where bound by 43 Eliz. Cap. 2. §. 5. Executors are chargable. But 2. this is however a new binding by the Defendants assent to the Indenture of assignment, though Infant and no party to Indenture: against which it was said that though this be an interest, yet its gone by the parties death, as of Servant hired for a year, he is not bound to serve the Executors of the Master; and though by 43 Eliz. Cap. 2. Executor should in point of charge be liable, yet not in point of contract to instruct Apprentice in Trade as the (85) Trades.

Master is. And 2. by the Common-law Infant was not bound to serve, but by 5 Eliz. Cap. 4. §. 43. if he be bound by Indenture, he is compellable to serve, which being in abridgment of the Common law is stricti Juris; but were it never so favourably taken, this bare ascent by Indorsment will not amount to a binding by Indenture being not party, and so there being no special custom, as in London alledged for the turning over, the Defendant is no Apprentice, and consequently may depart; which the Court agreed, and not proving the first Indenture the Defendant was discharged.

Dunkin *and* Brown. Ante.

(86) Devises.

THE Case was thus, Dunkin the Father of the Plaintiffs Intestate and Brother to the Defendant, had a Daughter Ann a year old, and deviseth the custody of her body to the Plaintiffs Intestate and the Defendant and two other Executors, during minority; and made them Executors, and hath another daughter, and dies, all the devisees, but the Plaintiffs Intestate refuse, he takes Administration cum testamento annexo and dies, and the now Plaintiff his Grandmother prayed Administration to him, and also de bonis non: Brown the Brother of the first Intestate, and one of the Devisees that had before refused to be Executor, enters a Caveat, untill the now Plaintiff had given an account of the first Intestates Estate, and would thereby gain Administration to himself as Uncle; after it was granted to the Plaintiff being Grandmother of the Children; and whether the renouncing the Executorship be any release or discharge of his right as devisee of custody of body, was doubted on Covenant, F. 24. and Dyer 160. b. Cremer for the Plaintiff, or whether this be sufficient ground for Prohibition, as to revoking the Grandmothers Administration, videtur quod non. Quære 1 Leonard 135. pl. 185.

(87) Leases.

A. Having two houses with a long Balcony going out of both, lets one to B. generally without mention of the Balcony, and after lets the other to C. with the Balcony thereunto belonging; afterwards the lessor divided the Balcony unequally, more to the last house than to the first, after which B. the first lessee pays Rent; but afterwards Rent being arrear, the lessor brings debt, and B. pleads the entry of the lessor into his Balcony, and making such partition in suspension;

on; and it was conceived this was no suspension. 1. Because this was not expressly let, and so was never out of lessors possession being never divided. And 2. if it were let, yet the paiment of Rent after the partition made, is an agreement to the partition, and purgeth the Tortious entry, they being at least Tenants in Common of the whole till division, especially if as 19 Car. 2. Cap. 3. §. 13. there be four foot left and two parts of front, else Quære.

DE

DE Termino Michaelis

27 *Car.* II. in *B. R.* Anno 1675.

Saturday, October 23.

Hale Ch. J. *Rainsford*
Twisden. *Wild.*

Bucknall *and* Sellweed.

(1) Execution.

EX motione Winnington Solicitor General, the Court granted a Supersedeas of Execution by Capias, being general unde convictus est, which is intended of Judgment in B.R. whereas it was on Judgment in C. B. affirmed in B. R. and though no Errors were assigned, but only Scire Facias, and Execution for not assigning Error, for the Capias as well as Fieri Facias must be special unde convictus est in C. B. and Judgment affirmed in B. R.

Dickins *and* ----

(2) Collusion.

A The Testator was indebted to the Plaintiff by Obligation, and made B. Executor, and died possest of a term for Years, without Impeachment of waste, A. brings debt against B. who pending the suit sells the Trees to C. the now Defendant. A. recovers and extends the Term by Ejectment on Fieri Facias. C. the vendee cuts the Trees; and the Plaintiff brought Trespass last Assizes at Cambridge, tried before Ellis Justice of C. B. and was nonsuited, because this was no fraudulent Sale by the Executors: But quære if the

the Defendant the Vendee could cut after recovery of the Term.

Andrews *and* Symson. Ante. *Monday*, October 25.

(55) Church.

Serjeant Baldwin shewed cause against a Prohibition to the Arches, in Suit for fee of Sepulture in Navi Ecclesiæ four Nobles of a Parishioner, a stranger four Mark, or he that procures him in St. Leonard Walbrook, for which the Parish alledge custom: and upon this matter, being remediless elsewhere, a Prohibition was denied in C. B. and albeit nothing before 13 Ed. 1. St. p. de circumspecte agatis, was cognoscibile by the Spiritual-Court, but Matrimony and Testaments; yet at Common Law none were buriable but in the Church-yard, and that they are buried in the Church is the charge of the Parishioners to repair: and so as on 21 H. 8. Cap. 6. of a Mortuary, the Suit is proper in the Spiritual-Court: so for a Pension F. N. B. 51. B. party hath election at least, there being no remedy for the Church-Wardens at the Common Law. Symson for the Plaintiff that the custom is denied and pleaded below, which was not so in C. B. and therefore denied, and no fee is due to the Church-Wardens at Common Law, therefore what is custom being only triable at Common Law, in case of Tithes, is so here; sed per Curiam the Church-Wardens may sue for a Tax for repair of the Church, so they may here; and though this be no Suit by the person who hath an Original right, where on denial of custom sued for, a Prohibition lieth, yet there is no remedy at Common Law for the modus; but the Spiritual-Court having a Jurisdiction of Sepulture, the Parishioners must sue there: but on denial of the custom a Prohibition, Nisi: and suit by Wild Justice hath been here by the Parishioners of Westminster for 50 l. for burying in the Abby; and Wild advised a Bill in Parliament for costs for the Plaintiff, and the Defendant in Prohibition; being not worth the charge of the Parish to try. Post. 527. pl. 13.

Many *and* Smith.

(56) Variance.

Serjeant Crook excepted in arrest of Judgment that William T. of R. was Sworn, whereas Distringas was William T. of Milton, and the Pannel Returned upon the Postea is W. T. of M. And by Twisden no averment can be against the Return of the Sheriff, that another was Sworn upon

21 Jac.

21 Jac. Cap. for here is no mistake in the Return of the Sheriff: But by Rainsford and Wild had the Sheriff mistaken the name in the Distringas or Pannel returned, such an averment might be, that it was the person meant that tried it; and there is the same reason here, being to be set right by Examination, and the person that tried, and the Sheriff, must attend the Court, that the Sheriff may declare if it were the person meant. Et adjornatur.

Perry *and* Whitley.

(5) Condition.

IN debt on Obligation, the Condition to perform Covenants, not to take or treat for a new Lease of Hearth-Bony without assent of the Plaintiff; the Defendant pleads he took no new Lease, contra form. Indent. to which the Plaintiff replieth, that he did take a new Lease, not said by or without assent of the Plaintiff; to which the Defendant demurs; & per Curiam the Replication is good enough: but if the Covenant were not to take no new Lease, and the Plaintiff had assigned breach that he took a new Lease, not said without assent of the Plaintiff, it had been ill, and not aided by saying contra form. Indent. But here the Plaintiff is misled by the Defendant, and the Issue good enough; and Judgment for the Plaintiff, Nisi. Hale and Twisden absent.

Holland *and* Ellis. *Tuesday*, October 26.

(6) Trespass.

IN Trespass of entring the Plaintiffs Close, and so many Cart-load of Corn, Hay, Pease, &c. not said Ipsius querentis ibid. invent. cepit & asportavit, joyned with other Trespass, and intire damages. Serjeant Scrogs excepted in arrest of Judgment; and by Wild Justice its ill, as in the Statute of Monopolies: in Syms Case Trespass of breaking the Plaintiffs House and taking away divers Goods, not said sua, and Judgment staid: but had it been Ibidem crescent' it would be intended sua; but here being Charactat. its severed, and may be a strangers Goods; which the others agreed, and Judgment staied.

Mathews

Mathews *and* Redman.

ON Communication of a Houſe of the Plaintiff out of repair, which the Defendant dwelt in, and ought to repair, and which the Plaintiff requeſted; the Defendant promiſed to pay all ſuch damages as the Plaintiff ſuſtained by not repairing. Withens excepted in arreſt of Judgment, that here is no conſideration, for if he ought to repair he is bound to do it ſtill, and not diſcharged by the promiſe; to which Wild Juſtice agreed on Clypſam and Morris Caſe: but by Twiſden and Rainsford this is no Aſſumpſit to repair, but to pay the damage the Plaintiff ſuſtained, which is no more than if the Plaintiff would repair, the Defendant would pay for it. Sed Adjornatur. (7) Aſſumpſit.

Dominus Rex and Cornelius.

EX motione Stroud, for a new trial on Conviction of Perjury, in Swearing before Trenchard Juſtice of Peace in Wiltſhire, That one Swayth was at a Conventicle, who was not; but it appearing the Defendant never made any ſuch Oath, and that the Fore-man was owner of the Barn, and challenged, and yet Sworn on the Jury; which per Curiam is a great challenge to the favor; and a new trial was awarded on Jenkins Caſe, Primats man on Conviction of Perjury by Subornation: and on one Jackſons Caſe in Gloceſter, where a new trial was granted in a Quare impedit on Symoniſts Oath as witneſs in Perjury againſt him that proved the title, and new trial, Niſi. (8) Perjury.

Green *and* Frind. Ante. *Wedneſday*, October 28.

EX motione Sarjeant Stroud, for Reſtitution and ſetting aſide Execution, after Warrant of the Sheriff to Superſede; which was denied, becauſe there was no Superſedeas granted by the Court before Execution done, and the Writ of Error allowed and delivered; after Execution awarded here will not ſtay it, but the Court may grant a Superſedeas thereon to the Sheriff: and if Execution be done before, Quære if Error being brought be a ſufficient Superſedeas whereupon to award Reſtitution: And by Hale Chief Juſtice on Judgment here the party hath Election to have Error in Parliament (9) Execution.

ment or in Exchequer-Chamber; and after Error in Exchequer-Chamber, Error lieth not in Parliament, of the Judgment 27 Eliz. Cap. 8. §. 3. in B. R. but only of the affirmance or reversal in the Exchequer-Chamber. Sed adjornatur to examine.

Wolly *against* ---- *Thursday*, Octob. 28.

(10) Judgment.

EX motione Bigland, for Pony out of Court on Warrant of Attorny. Hale Chief Justice on conference with all the Judges, said it was a great grievance that Judgments should on Warrant after Trinity Term, and a little before the Essoyn day of Michaelmas Term be acknowledged, as of Trinity Term, because hereby the purchasor is unsafe, and can make no discovery of it by Bill in Chancery, in or after Trinity Term, which Avoyds Mortgates, Sales and Judgments duly Executed after that Warrant, and before the acknowiddgment; but if it were on a Warrant precedent to Trinity Term, it might be as of the Term subsequent, unless by fraud; but its not Just to have such Relation, nor to make the Warrant with Ante-date; and they agreed to settle a Rule.

Lavender *and* Blackston.

(11) Collusion.

IN Ejectment on Lease of Gorking, on settlement of Pudsey, 1653, by Fine and Deed to the Trustees to pay all debts contracted, or for which the Trustees were Bound, for 15 Year, the Remainder to be disposed by Pudsey for Joynture of the Wife, and power to make Leases, and the Plaintiff claimed by Lease 1668, on consideration of debts 1665. the Court agreed that part of the settlement may be fraud, part not. 2. That on Auditor Philips Case, and one Spencers case of Oxfordshire, that Trustee of prodigal may provide settlement on payments of debts, and good against debts Contracted after. But, 3. here was provision only of such debts as the Trustees Contracted, and not of debts generally Contracted, which was a badg of fraud. Secondly as to the residue to be to the first Son of Pudsey, after debts, which is voluntary, being contingent whether the debts should be more or less. 3. The power to sell is by consent of the Trustees and Pudsey, and Pudsey to enjoy till Sale, which might be for ever, and no Sale made: and albeit the Estate were 1600 l. per Annum, and the Feme Dowable of

600 l.

600 l. and joyned in after-Fines and Sales, and to have Joynture only of 300 l. a Year, yet she not joyning in the first Fine to Boucher of the main Estate, nor in this settlement, after Marriage, its fraud. Especially, 4. There being a power in Pudsey, after present debts paid, to make an intire Lease for 99 Years, with Rent or without, which amounts to a power of Revocation: Although it were to be sly, by the assent of Sir Thomas Davison, because he was not a meer stranger or Creditor, but a Relation and Father-in-law; and by direction of the Court the deed of 1653 was found fraudulent.

Dominus Rex and Fenton. *Friday*, October 29.

TWisden excepted to Information upon 23 Eliz. 1. Sect. 5. for not coming to Church, that its not averred that the Defendant was not at the time of the offence an Inhabitant within the Realm; sed non allocatur, for being Convicted this must be intended: and if he only come here for a month, it were evidence of not guilty. 2. Upon 21 Jac. Cap. this Information ought to be before Justices of Peace, &c. and therefore its not well here; and this the Court doubted, this being for the 20 l. a month. Et adjornatur. (12) Church.

Andrews *and* Symson. Ante. 523. pl. 55.

THE Court agreed that no Prohibition lieth respectu Jurisdictionis, in suit for burial fee, but respectu triationis it doth after an Issue offered there upon the Prescription, and so resolved at Oxford, Term. Mich. 1665. in a Case propounded by the Lord Bridgman Chief Justice of C. B. on a Modus sued for of Iron Oar as Tithes, where Issue was on the Prescription its triable at Common Law, and if found for the Modus the Ecclesiastical Court may proceed, if not Stet Prohibitio, and so where ever their course and ours differ Prohibition lieth, where they do not they may proceed; for they have some Prescriptions of 10, others of 20, others of 40 Years; and one Prescription between parties present, another between parties absent: but ours in all Cases is temps d' ont, &c. So Bounds of the Parish, though incident, plea is triable at Common Law: and here the reparation of the Church is not directly in question; and a Prohibition granted. (13) Church.

The Lord Anglesy *against the Lord* Ossory.

(14) Guardian. EX motione Serjeant Maynard for Habeas Corpus for the Lady Decies in custody of the Lord Ossory now, but devised by Fitz-Gerrard to the Lord Tyrone. Hale Chief Justice and the Court agreed, that 12 Car. 2. Cap. 24. Sect. 8. doth extend to Ireland, and that the Guardian appointed by the Will may have ravishment of Ward, as the Guardian by Knights service, or in Socage at Common Law, yet Habeas Corpus granted: but after ordered by King and Council to the Lord Ossory.

Knoyle *and* Heymor.

(15) Devise. EX motione Stroud for a new trial in plea by the Defendant his Executor and Devisee, by Nuncupative Will against the Plaintiff, who is Administrator, and brings Trover; and the Defendant justifieth by this Will, and Issue that there was no Will; which was set aside in the Spiritual-Court on appeal after Sentence. Hale Chief Justice said, that after Sentence in the Spiritual-Court of Will, against clear proof to the contrary, he offered Evidence in Trover to prove the Will; and in this Court was over-ruled: and so as to the Fact a stranger cannot falsifie against a Verdict, but in other collateral points he may, confessing the main, as 3 Inst. in case of an Endictment: and in Whitmores Case in the Exchequer if the Administrator payeth all that the Executor should, he shall recoupe in damages, in Trespass by the Executor after the Will found; so Peckhams case. And it might have been replied, That the Defendant made no Will, the bar being specially that there was a Will; but yet a new trial, Nisi. And clearly it should be so upon the general Issue.

St. John *and* Moody. Trin. 22 *Car.* II. Rot. 1501.

(16) Way. LEvins excepted to Declaration after Verdict in Action upon the Case for disturbance in a Way, quod habere debuit de Jure, without shewing any particular Title by Prescription, &c. Sed non allocatur, this being against a Tort-feasor

ſeſor, no Title is neceſſary, as 1 Cr. 499. and in actions for diſturbance of Toll in a Fair, there needs no Title by Patent, or Preſcription againſt the Tort-feſor, but againſt the owner of the Soyl a Title muſt be made, as in Juſtification for a Way, its not ſufficient to ſay quod habere debuit, but in a Curia claudend' its only quod reparare debet & ſolet, not ſaid time out of mind: and Lord Barclaies caſe of a Market was ruled on advice, that no Title needs againſt the diſturber that hinders the peoples coming, yet this is an Incorporeal Inheritance, and ſtronger than the caſe of a Way. Sed adjornatur.

IN action upon the caſe for diſturbance of a Watercourſe whereby three Acres of Moor or Meadow was ſubmerſa & ſuper inundata, was excepted by Saunders in arreſt of Judgment; for per Curiam Moor, Meadow and Marſh are ſynonymous; but in Fine or Ejectment, it were ill; and Judgment for the Plaintiff. (17) Sewers.

A. Tenant for life, the Remainder in Tail to B. the Remainder in fee to B. the 18th of May a Covenant to levy Fine in Trinity Term following, and the Recovery to the uſe of A. in fee. B. the firſt day of Trinity Term releaſeth all his right to A. in fee, then B. confeſſeth a Judgment to C. and then a Fine is levied accordingly, and in Mich. Term after a Recovery ſuffered. A. dieth, B. dieth without Iſſue, C. extends upon the Judgment againſt the Heir general: and doubted if the Eſtate be chargeable: on 1 Cr. 103. Holt and Sambach, and Entry Congeable Br. 77. (18) Tail.

Terry *againſt* Stredwick. *Saturday*, October 30.

SYmſon excepted in arreſt of Judgment in action upon the caſe, for ſhutting up a Watercourſe running over the Lands whereof he was poſſeſſed, whereby it was ſurrounded, and ſeveral Cattle, and Cart-loads of Hay, &c. not ſaid whoſe, deſtroyed. 1. Becauſe no Title is alledged in the Plaintiff, that the Water-courſe ran to his Freehold, &c. Nor, 2. whoſe the Cattle and Corn were, but only in Mariſcis friſcis jacent' & creſcent' were deſtroyed; ſed non allocatur, (19) Sewers.

1. For

1. For whether the stop were in anothers ground or in his own, its a wrong. And as to the second, Wild conceived it was aided by Verdict, albeit, not said Ipsius querentis, but contra Ruled: and 2 Cr. 46. pl. 15. Brewer and Martin and Johnsons case, Trespass of digging his Soil, and carrying away twenty load of Soil, not said Ipsius querentis, which is ill; but had it been crescent it had been aided, but being jacent. only its ill, and to this the rest inclined. Sed adjornatur.

Brown *and* Collins.

(22) Administrators.

IN debt on Obligation against the defendant and his Wife as Administratrix of B. de bonis non, Administred by C. Executor, &c. after general Judgment de bonis testatoris on non est factum a Fi. Fa. is taken out with Sc. F. and a Devastavit procured to be Returned. Pemberton the Kings Serjeant prayed to set it aside, because no Assets was ever in question, and hereby the party would be put to an aftergame. Sed non allocatur, for till 3 H. 6. there was no other way as now used by Fi. Fa. with Sc. Fa. and albeit this be a false Return, yet the Court cannot help it; but its at peril of the Sheriff, and this was a trick by the Defendants Attorny to waive his first Plea of plene Administravit, to plead non est factum, whereby to hold the Plaintiff out longer in the Enquiry and Traverse of Assets, but Qui cheatat Cheatabitur. And Judgment for the Plaintiff affirmed, and Execution well done.

Arthur *and* Haulin *Tenant of Lord* Salisbury.

21 Maii.

EX motione Mountague for new Tryal, on misconstruction of ancient Patent, 22 H. 8. de 300 Rhodas terræ in Longitudine, by the Plaintiffs Counsel was said to be Roods, by the Defendant to be Rodds: By Hales Chief Justice the proper words are so many perticatas, viz. three foot and a half, but Rhodas in length is Rodds, which is the same, but Rhoda generally is a word of quantity, for the fourth part of an Acre, and the Acre which is 40 Perch length, and four breath, and if less in length, more in breath, and the Evidence hereof is the usage: But by Twisden all might have been aided by an Anglice, but this not being the weight and chief of the Evidence, new Tryal was denied in Trespass.

St.

St. John *and* Moody. Ante.

POlyxphen on 1 Cr. 325. Symons Case, 1 Cr. 575. Sanders and Trefusee, and 2 Cr. 673. Slackman and West, and on the latter usage conceived the declaration good and founded only on the possession, and so prayed Judgment. Levins for the Defendant, that the Defendant cannot know to what to answer: Also this is action upon the Case, which must be special, and so 2 Cr. 123. Dent and Viner of Trespass is not like it, and here is no possession of any way, but disturbance in a way, quod ad tunc & huc usque habere debuit, which might be by Covenant only, and though de Jure is sufficient in anothers soil, yet not in his own or for use his own Woods, &c. But per Curiam, its well enough by the Verdict: But Twisden doubted it would be ill on demurrer, or by way of Bar, Replication or Justification against owner of soil, to charge it with a way; so title against disturber of coming to Leet, needs not but in Quo Warranto, for its title must be shewed; so in Assize for Rent against Tenant, title must be shewed, and he may plead Horsde son fee, it was used to say it was used to have Current to a Mill, and so usitatum est to repair, yet now in both cases its constantly held sufficient to lay possession, or quod ocupatores, used to repair: and Judgment for the Plaintiff. (22) Ways.

Dominus Rex and Sedan.

ON Habeas Corpus it was excepted that by the Return it was that he being Nonconformist came to St. Giles, which was within five miles of a Corporation, and Preacht at St. Martines, not said within five miles of a Corporation: Which by Hales Ch. Just. and the Court is ill, and on 17 Car. 2. Cap. 2. §. 2. uncertain what offence, these being against distinct Laws. 2. Its said he Preacht at unlawful Conventicle, not said contrary to the Laws and Statutes, as 14 Car. 2. Cap. 4. is, which per Curiam is ill, but false Imprisonment lieth not upon insufficient Return, nor is a Warrant void that omits Quousque delivered by due course of Law, and he was Bail'd. (23) Religion.

Bugby

Bugby *and* Hull, Pond, *&c.* Ante. *Saturday*, November 6.

(24) Prescription. IN Replevin the Defendants made Cognizance as Bailiffs of the Burghesses and Commonalty of Malden by Custom that Bailiffs, &c. and all those whose Estates they have in the Borough, &c. have used by reason of repair of Bridges being seised of the Borough to have 10 d. every Mark Purchased there as a Land-cheap, and prescribed to distrain; and Issue is both on the Duty and the Custom to distrain, which was Ante. tryed in Chelmesford, & per Curiam, whither this were applied to repairs or not is not material, for they must repair when needs, whether Lands be sold or not. 2. Though a Corporation as such cannot be entitled by a que Estate, yet if they Purchase Lands as here the demean of the Mannor of Malden Conveyed, viz. the Soil, Stallage, &c. 9 H 4. to 20. of the Corporation, to use of the Corporation and also for the Custom of a Land-Cheap, they may thus prescribe without shewing the deed, because the Mannor was thus chargeable, and the prescription is not that the Corporation have used; but that the Borough, and the word Borough implies both the Lands and the Corporation: so if it be true in either sense its sufficient. And 3. though here only the Land-cheap was granted by the Bishop of London, seised of the Mannor, yet by a long possession the Court will presume all right; as in Ferrers Case against an Entail, they presumed an Act of Parliament to break and cut it off: also in Armin and Beels Case in Lincolnshire, a licence was presumed on long enjoyment of appropriation; and in Rogers Case, Latches invention of lodging ancient Title in the Crown was decryed to put the other side to prove how it came out, where ancient possession hath been, and here the grant was of the Dominium, viz. the Soil, and several Franchises reckoned so, whether it were the whole Mannor or but a part of it, the Grant is not in Gross, but as appendant to that part of the Mannor granted, and Nonsuit for the Avowant with damages de bene esse.

(25) Court. QUære if debt lieth upon a Judgment in a Court Baron, 2 Inst. 23.

Supra

Supra.

NOta that it was said to be adjudged in the Exchequer, that debt lieth against the Executor of an Executor de son tort, as to the Assets left by the first Testator: but on argument at Sarjeants Inn on Error in Exchequer-chamber, before Hales and North Chief Justice. Hales doubted it was a Tort that dieth with the person. (26) Executors.

Pratt *and* Bullock. *Monday*, November 8.

SAnders plaied Process against the Defendant, and the Court of Conscience, or Request erected by 3 Jac. Cap. 15. §. 4. because that Court hath no power to proceed there to stop any suit begun in other Courts, much less in this, but the suit must be originally there. 2ly. This debt upon a Bond of 10 l. forpaiment of 5 l. which is thereby out of their Jurisdiction, and being deteined by the Clerk of the Commissioners, which are one Alderman and three Commons monthly: an Attachment was awarded, Nisi. (27) London.

Wheler *and* Lambert.

EX motione Sarjeant Baldwin to discharge Prohibition as in Easter-term and Trinity-term last, was done in C. B. on suggestion that the Parishioners of St. Peters in Colchester, used yearly in Easter week to chuse Church-Wardens, and that none else can execute as such, pleaded in suit by the Defendant in Spiritual Court for Taxes and Charges expended by Anger, inreparation of Church Bells, &c. two years last past as Church-Warden de facto, and if not legal, the Parish might have had a Mandat to remove him. Hales Chief Justice said that where the question is who is Church-Warden, a Prohibition lieth; but this is a suit to pay a rate set by the Parson of the Parish and Church-Wardens, so whether the Church-Warden do any thing or not, the Spiritual Court may enquire of the Default of reparation, and it might as well be put in Issue whether he were rightful Parson: Also if the Church-wardens do not agree, yet if the majority of Parishoners Tax, its sufficient, as Jeofferies Case, which the Court agreed, and that its too late now to exa- (28) Church-Wardens.

mine this in the Succeſſors time, and Prohibition was denied.

Biggin *and* Bridge.

(29) Tythes. ON demiſe of Tithes, debt on Obligation to pay ſo much at Michaelmas next, and ſo much at Lady-day following; and ſo much half yearly during the term, which was from the 20th of February 1661, untill Michaelmas 1668 proviſo, that on default of paiment that the leſſor be free of Obligation, and grants to the Plaintiff: and breech aſſigned in non-paiment at Michaelmas 1668; to which the Plaintiff demurred, becauſe not within the term: But by Twiſden in contracts the intent is ſufficient, and ſhall include the day; and in the Earl of Northumberlands caſe on demiſe at Will, and Rent half Yearly, virtute cujus the leſſee entred and enjoied uſque Michaelmas, which was held to include Michaelmas-day, this day being as an indiviſible point, and not like an Indictment of repairing way from ſuch a place uſque ſuch a place, which the Court agreed. 2. Being the laſt Term, albeit, it were to pay at Michaelmas or within 21 days after, yet the laſt Rent is not loſt. Sed adjornatur.

Morris *and* Kiffin. Ante.

(30) Rents. IN debt by Adminiſtrator of Tenant for life, againſt perſon of Profits for arrears; the Defendant after Imparlance pleaded an Utlary in abatement, which was agreed ill on demurrer. But Sanders for the Defendant excepted that this Action is local; and the Action not brought where the Land is, to which the Court agreed, becauſe the profits are in the Realty, and the contract is determined, and the charge only by reaſon of the pernancy; and its not like 7 Co. Bullwers caſe of an Aſſize, where the Land muſt be put in view, and in Hall and Arnolds caſe, on leaſe to Trott, debt on arrears of Lands in Monmouthſhire was held local, albeit the Rent-charge was paiable at the Exchange in London, and Reverſed in Error, becauſe the action was brought in London: Twiſden held it well enough, but a Reſpondeas Ouſter Awarded. 2. The Lands being in Wales the Action lieth not in the next County, but only on a Quo minus: Alſo if the Tenant be at a rack Rent, that muſt be deducted, &c. and only overplus liable.

Dominus

Dominus Rex and Fenton. Ante.

(31) Religion.

BRewer prayed Judgment on 23 Eliz. Cap. 1. the Justices of Assize, &c. having only additional power of enquiry, for expedition by Indictment only; 11 Co. 61. Fosters Case, resolved that an Information lieth here as before: So Hub. 204. 135. and a Proviso as in 21 Jac. Cap. 4. §. is that Recusancy is excepted in the trials before the Justices below, and before 21 Jac. all Popular Actions were suable at Westminster, albeit the place of Venue must be where cause arose, and for that reason pro Rege. But the Court conceived that where any Statute gives Recovery by Information, there Informations may be before Justices below, else not.

Rouse *and* Jackson.

(32) Remainder.

ERror of a Common Recovery, suffered by Charles on settlement by the Father on Marriage of Son, to use of Charles for life, and if he have Issue Male, to such Issue Male, and on death of Charles without Issue to the Father in Fee; the Error was assigned in appearance of Infant by Attorny, and in nullo est Erratum pleaded, which is confession of Infancy, &c. Now Polyxphen prayed Reversal, the Remainder in tail being executed in the Plaintiff by the death of Charles without Issue, albeit there were an entail after to another Brother, & per Curiam, Charles was Tenant in tail. But by Hales Chief Justice that is doubtful. Sed adjornatur.

Darrell *and* Withers. Ante. *Tuesday*, November 9.

(33) Tythes.

IN Trespass the Defendant pleaded the Hay grew in Kings Clere, and A. was Vicar at the time of the taking, and took it as Tithes, to which the Plaintiff makes a new assignment of the Trespass in other places; to which the Defendant demurred, being for carrying away Hay cut, not for cutting the Grass, which the Court agreed ill, but party agreed to amend and try de novo, &c.

Wigon *and* Garret. Ante.

(34) Powers.

IN Ejectment on demise of Lord Lee of fourth part of Long Itchington; Special Verdict find Robert Earl of Leicester seised and by Indenture with the Earl of Warwick, &c. Covenant 21 Eliz. to levy Fine to Hoberd, to the use of Robert in Fee, and for paiment of his debts to be sold, with a power to revoke by deed or will in presence of Witnesses, and 22 Eliz. a Fine was levied to those uses; after the 1. of Feb. 24 Eliz. Robert by Indenture with Hobard for advancement of Dudly his Bastard, Covenanted to levy Fine to use of Robert in tail, Remainder to the Earl of Warwick in tail, Remainder to Dudly the Bastard, Remainder to Heirs of Robert, which was levied accordingly, and 14 July 26 Eliz. Rob. by Indenture with Sydney, Covenant to stand seised to use of Robert for life, Remainder to his Wife Lettice for a Jointure, Remainder in Fee to Robert; and 1587 devised after death of his Wife to Dudly for life and his Issue, and died 1588, Lettice survived, and entred, and lived till 1634, and no entry by Pembrook or other Trustees in the deed, 21 Eliz. but he survived and had Issue William Earl of Pembrook, who sold to Lord Lisle, who was seised prout lex, &c. and the 12th of June 2 Car. 1. Covenanted on Marriage to levy Fine to Farnham, to the use of Lord Lisle and his Wife, Remainder to the Heirs of his Wife; after Robert lessee of Lettice determinable on her death entred and had Issue five Daughters: Lord Lisle Jac. assured the Lands in question, with Letter of Attorny and Feoffment to use of himself. Sir Robert Dudly by Lease and Release 21 Jac. 1. conveied to Ann and Francis, daughters of Lord Lisle, Francis died, Ann Holborn survived; and by deed Enrolled sold to Powell 1656, against whom Recovery was suffered to B. vouching Sir Richard Luson and Lady Ann Holborn; then Sir Rich. Luson died, and Lady Leviston entred the 6th of Mach. 1656 untill 1674 and then died seised: and Lord Leigh as Cosin and nert Heir of the Lady Luson entred and let to the Plaintiff. Serjeant Hopkins for the Plaintiff, that the Fine by the Earl of Leicister 24 Eliz. doth not destroy the power of Robert in the deed, 21 Eliz. but is in Execution of it; but if the Fine had been without any deed of uses precedent, or had it been a Feoffment, the power had been Extinct, on 1 Co. Albanys Case, and 6 Co. Digs Case, but here the deed and Fine shall be taken as one Conveiance,

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as 1 Cr. 472. Turton and Snape, whatever is Executory shall refer to the original cause, albeit, found at several times, as 1 Co. 101. Shellies Case, where though the Recovery was not within the Year, yet this should not overthrough the substance of the agreement, so Dyer 157. pl. the Fine neither extinguisht the Rent nor Condition, being continued by the precedent agreement and covenant, so Moor 298. pl. Short and Holloway, and Roll Abr. 2. part 755. Tit. Uses. A Feoffment referring to former deed of Covenant will not make a revocation of former, nor gives no other Estate than what is mentioned in deed of Covenant, and so the Bastard Sir J. Parrot was defeated, for want of a sufficient consideration, and the Execution of such powers are favoured, 1 Inst. 237. albeit they could not be in a Common-Law conveyance, and there needs no recital to make the latter deeds, as 10 Co. Scroops Case, to be in Execution of the former, but the bare declaration of other uses subsequent, makes the former uses void, and new arise, so Roll. Abr. 263. tit. Powers, and Hob. 312. non refert verbis, an factis fit revocatio; and its not intire as a Condition, but may be revoked by parcels, and exposition should be ut res valeat. Finch for the Defendant, the only question is on the deed and Fine 24 Eliz. if it extinguish the power in 21 Eliz. and it cannot be a Corroboration, because it is to other parties to other uses. And 2. it cannot be in persuance of the power of Revocation, because it doth not pursue all circumstances as a last Will, in Hob. 312. unless delivered in pursuance of three Witnesses; a writing was no deed within the power, and here a Covenant to levy a Fine to uses and Fine according, if not within the power of revoking by any deed or writing under Hand and Seal; and unless the intent of parties be according to Law it is not material; and the deed and Fine because it is one intire assurance, and must so work, its not according to the power, the Fine alone is not, and the deed 5 Co. Countess of Rutland is only directory of the uses, and passeth nothing, which is only pleaded vertute finis; and Michaelmas 6 Car. 1. in C. B. Rot. 442. Ingram and Parker, Sir William Catesby conveied, with proviso that he or his Son by deed under Hand and Seal might revoke, Sir William dies, Robert the Son by Bargain and Sale sells for 1000 l. which was not enrolled; and after a Fine was levied according, & per Curiam, held that this Fine was an Extinguishment, yet here the Bargain and Sale was a sufficient direction of the Uses. Hales Chief Justice said he was not satisfied with this Case, supposing there was a Covenant in the Bargain and Sale, that the Fine

should be to the uses of the Bargain and Sale, which is all one then with the case at Bar: But by Twisden in that case, Sir William was but Tenant in tail, so his Bargain and Sale was good for his life only, but in the case in question the deed of Covenant is wholly void, and operates only by Estopple, unless it enure as a revocation. Hales Chief Justice, the deed of Covenant alone would not be a revocation, being suspended in operation till that Act on which it is to work, and is but an Executory intention, for it may be he will not levy the Fine, and so no compleat revocation. 2. The Fine alone is no revocation, because that is not a writing under his Hand and Seal, but now the Covenant is become a new revocation, being established on the Fine, and so is an execution of the revocation, Quæ non valent singula, juncta juvant, the new Uses shall take out all the former Uses that were suspended until the levying of the Fine; so Covenant to levy Fine to Lessee for Years to make him tenant to Præcipe: for a common Recovery is no merger of the Term, being to other Uses, albeit suspended untill the Recovery, yet when this comes the Law Judges on the whole, that he is but an Instrument; but had the deed been subsequent to the Fine, it would be no revocation, unless on precedent agreement as Dowmans Case: but subsequent declarations by Infants and Feme coverts are binding, unless other matter intervene; and in Ingrahams Case the Bargain and Sale alone, were it to come again would prove a good revocation: Also there it was not found that the Fine was to confirm the Bargain and Sale, and here the Fine is in confirmation of the Covenant, and where it cannot have any effect to serve any intent out of an interest, it must serve as a revocation, as 6 Co. Sir Edward Cleeres case, devise generally is no Execution of his power, but if he hath before disposed of two parts, there the devise generally is good out of his power, being not to be satisfied out of the interest; so here Robert Earl of Leicester had no interest for the latter deed to work on, therefore it must operate out of his power: and in Heale and Thetcher A. Mortgaged to B. for Years, A. covenanted to levy Fine, B. re-conveied to A. reserving a Rent, then A. levies a Fine to B. which was agreed to extinguish the Term, but if there had been a covenant in the Mortgage to levy Fine in confirmation, it would be no extinguishment, and so in Audlies Case resolved, and this was never thought a point fit to argue during these 30 Years that this case hath depended, and so a Lease and Release would be a good Execution of such a Power, and the lease

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no ſuſpenſion, & per Curiam. Judgment for the Plaintiff, Niſi.

Skellington *and* Norton. Ante.

ON variety of opinion at Seſſions a feigned Action is with Special Verdict, that Killingworth in Warwick is a great Town of two Vills; In one Pariſh only one Church, and no Chappel of Eaſe, two Church-wardens; but the Tenants of both paid dividedly to their Poor, and if on 14 Car. 2. cap. 12. §. 21. N. 2. they may be now Tax intirely was the queſtion, on diſtrels on Inhabitants in one Vill, to pay Taxes to the poor of the other, on Iſſue, that if each Vill is priviledged againſt the other found for the Plaintiff. Newdigate for the Plaintiff agreed that generally all Inhabitants are chargeable, but if there be diſtinct Conſtables and Rates before 43 Eliz. Cap. 2. they are ſo ſtill, 1 Cr. 92. & 394. & Roll Abr. 560. and the Statute 14 Car. 2. alters the Law, and is not in affirmance of it; and this was no order of Seſſions which would bind all, but its levied by order of two Juſtices of Peace, and affirmative Law, Pl. Com. 206. & 11 Co. 56. Contra to precedent of 43 Eliz. Cap. 2. hath the force of a Negative; and uſage ever ſince 43 Eliz. Cap. 2. is ſufficient to make it a reputative Pariſh diſtinct, and in the caſe of Hill. 22 & 23 Car. 2. Bonner and Wilſon, where three Vills were found in Cambden ancient and relieving Poor diſtinctly, that there was an order of Seſſions for a promiſcuous Tax to the Poor, and the Plaintiff found to be duly choſen Churchwarden; and that Verdict concluded, that if he were not duly choſen for the whole, it was for the Defendant; but here it was not found a large Pariſh, and therefore was over-ruled in C. B. for the Defendant. 2. Serjeant Hopkins for the Defendant, that this Pariſh is not named in 14 Car. 2. Cap. 12. §. 21. therefore not compulſed by the name of other places: Alſoits not found that this Pariſh is ſo large that it cannot reap the benefit of 43 Eliz. Cap. 2. by reaſon of the largneſs, ſo its ſufficient to find it a large Pariſh alone, and the Statute is only affirmative, and this was one reaſon of Bonners Caſe, being ruled for the Defendant. But by Wild that was then Juſtice of C. B. it was adjudged for the Defendant, becauſe it was not found that Glocester was any of the Counties mentioned in the Statute 14 Car. 2. Hales Cheif Juſtice ſaid, there can be no preſcription againſt 43 Eliz. Cap. 2. but if there hath been a Chapie of Eaſe, and Chapel-wardens, and diſtinct Rates, this by conſtruction is a Pariſh within 43 Eliz. Cap. 2. but if no Pa- (53) Poor.

riſh

riſh in truth nor reputation, as appears here in the Verdict, the preſcription is void. The Statute 14 Car. 2. Cap. 12. extends not to all great Pariſhes, for thereby 43 Eliz. would be out of doors, the event of which would be to lay the charge on the Borough where the Bulk of the Poor is; and the out-Vills where the Lands are, would be diſcharged: Alſo the Seſſions elections could not alter the Statute of 14 Car. 2. Cap. 12. but muſt be undue if the taxation were ſeveral, and here is no preſcription to maintain the Poor diſtinctly, which might be conſiſtent with 43 Eliz. 2. and all the Pariſhes on this ſide Trent have been tax promiſcuouſly, and they cannot be diſtinct unleſs there be a Pariſh in reputation, but only by compoſition: Alſo other places refer to the particular Counties named before, and it muſt be found a Pariſh that by reaſon of the largeneſs could not receive Contribution, by 43 Eliz. Cap. 2. though this were in a place beyond Trent; and the naming the Counties particularly, intends the Parliament ment not all over England; and Preſcriptions are left as they were before 14 Car. 2. Cap. & 43 Eliz. Cap. 2. §. 3. that gives a Juſtice of the Peace power to Tax out-Pariſhes, gives no power to tax out-Vills. And Judgment for the Defendant, Niſi.

The Corporation of Wickham *againſt the Mayor.*
Wedneſday, November 10.

(36) Poor.

EX motione Mr. Solicitor Winnington for confirmation of a Tax laid by Juſtices of the Peace on a Toll of the Corporation of Chipping-Wickham in Bucks, for a Rate to the Poor. Hales Chief Juſtice ſaid that on reference to him by both parties, he was of opinion that the Toll was not exempted, but chargeable; albeit, part of it were to maintain the Mayor thereof: & per Curiam, A Mandamus granted to the Mayor and Juſtices to execute the order, Niſi. So Infra.

Ridly *and* Fownell. Ante. *Thurſday,* November 11.

(37) Leaſes.

WEſton prayed Ven. Fa. de novo, the ground of the fact, for the Judgment being imperfectly found, Roll. Abr. Trials §. and if Verdict had found Leaſes uſed before 1 Eliz. it had been againſt the Plaintiff, and ſeparalibus temporibus is uncertain whether before or ſince, and the uſual grant ſince, albeit not granted before is evidence, by Hales Chief Juſtice; but if only granted ſince and not before, its an Office of neceſſity, and ſo not grantable; and Co. Biſhop of Salisbu-

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ries case is full to this point, and in special Verdict Israel being not found dead shall be intended alive, 3 Cr. 238. Allen and Hill; & per Curiam on this imagination the Case must turn. Et Adjornatur.

Hodskin *and* Thornborough. Ante.

IN debt for Rent on Lease of Copihold to the Defendants Testator, who entred, and for Rent arrear in the Executors time, the action is in debet & detinet; the Defendant pleaded Entry of the Plaintiff into part; to which the Plaintiff replied, That the Defendant least that part to Knowles, who assigned to the Plaintiff, whereupon he entred; to which the Defendant rejoyned impertinently; and the Plaintiff demurred. And by Saunders this acceptance shall not extinct all the Rent, being not on lease for life, or a Rent by tenure, which are to be Recovered by a real remedy of distress or Assize that puts the whole Land in view; in which case there can be no apportionment: and 4 Co. 53. Rawlins case, is meant only that the distress and the condition is suspended: and Darrel and Andrews case, 1 Roll. Extingment, Sect. makes for the Plaintiff: and on Lease for Years where there is election of distress or debt, yet there is difference, for Tenants in common shall joyn in debt, albeit they may sever in Avowry; also debt lieth against the assignee of the Term, 2 Cr. (38) Rents.

Hawkins case, for Rent reserved, and if the assignee makes under-lease to the lessor of part, it will not determin the first Contract, albeit the distress may. So if A. seised in fee lets for Years, and grants the Reversion, saving the Rent, as he may, the Grantees Entry cannot extinguish the Rent, but debt still lieth for it, although not distress, because of the severance of the Reversion. So where A. enters by license of the lessee at Will, and holds half a Year, he is at least Tenant at sufferance; in which case no distress can be, yet debt lieth; but if Tenant at Will Licenseth to hold for half a Year, he would be a lessee at Will. Polyxphen for the Defendant that its the same in case of a Lease for Years as for life, both Issue out of the Land, and the Rent alike Issuing out of the whole Land, and suspended by entry into part, which is a good bar in both, Roll. Abr. 938. would have destroyed the lease at Will, had it been more than a License: and in 4 Co. Rawlins case, if the Rent were not suspended, the Condition would not; and had the re-demise been in possession it would be a suspension. Hale Chief Justice said the

lessor hath as much the possession by a License as by a Lease at Will: and 17 Ed. 3. 57. is that its apportionable, and no case direct against it. Anciently there was a persuasion that none could be Lord and Tenant of the same thing, as Bract. the Father held of the Eldest Son by Homage, the Land should discend to the Younger Son; which Law is now Antiquated. Avowry 116. is that its apportionable, and is swallowed pro confesso, in 4 Co. Rawlins case which reacheth not the end of the case, for there may be an extinguishment of a condition where the Rent is but apportioned, so they differ 1 Inst. 148. and it hath been constant Evidence against Suspensions by Entry, to shew the Entry was by License of the Tenant; which the Court agreed, for it can never be said Expulit & Amovit, where the Entry is by Lease or License; and this would be else mischievous about London, &c. if there were an immediate Lease from the Tenant to the lessor at a Rent, there will be an apportionment only by way of Recouper, but not of the Rent; and here is no Rent reserved by the lessee of the stranger, who assigned to the first lessor, so its not apportionable, because if there be an apportionment it may be by the Jury on nil debet in debt for the whole, which cannot be in this Case; and this is no immediate Lease by the lessee to the lessor without Rent, but by the stranger that paid no Rent, during which the lessee stood liable for the whole, each shall answer according to his own Contract: as if A. Lease to B. 20 Acres of equal value for 20 Years at 20 l. Rent, and after A. takes back one Acre on paiment of 5 l. a Year for 7 Years: for a Garden here shall not be another apportionment according to the Rent: viz. 20 s. but A. shall answer his 5 l. per Annum, and discount it out of the 20 l. per Annum, or else each recover according to their Contract. Sed adjornatur.

Wheely *and* Lambert. Ante.

(39) Church-Wardens.

THE Court granted a Prohibition upon agreement to pay costs mutually on trial of custom to chuse Church-Wardens, but said none ought to be else, because the Officer was so in Fact, and no other chose, and the repairs done, and Office determined, and the Tax the act of the Inhabitants, and they compellable by the Ordinary to raise the Tax for repair of the Church: but for fear of misconstruction of this, as if they would not grant a Prohibition where custom is alledged against the Canon to chuse both the Church-Wardens by

by the Inhabitants, as in the case of St. Thomas Apostles the Prohibition was granted.

Cumberford *and* Birch.

A. Settles to the use of A. and Heirs Males, then to the use of the Trustees to sell for Portions of the Sisters, and Legacies, and to Lease the Remainder; if the Brother J. finds Surety, not to disturb settlement on such as J. appoint; and if J. gives no Security to the Trustees to Lease; and if none of the Brothers or Sisters have Issue living, then after the Term ended, to the use of others in Tail; and there are Brothers, Daughters and Sisters living. And by Levins this Clause must refer to the first part rather than be void; which Case appeared on the Declaration in Action out of Chancery. But by Weston the settlement is void and nonsense. Sed adjornatur. (40) Uses.

Welch *and* Wall.

IN Avowry for Quit-rent, Special Verdict on traverse of seisin by the hands of very Tenant, finds 2 & 3 Philip and Mary Feoffment by Newport to the Bishop of Ely, that the Bishop of Ely afterwards had made to Trinity College a Lease for 29 Years with reservation of tenure in Frankalmoyn, and after 1 & 2 Philip and Mary, Cap. 8. was repealed, 1 Eliz. Cap. 1. and this Clause is not reserved; yet per Curiam being done in Execution of the Statute before the Repeal came, its well enough; especially being not found to be a Spiritual Corporation; and so whether Trinity College was very Tenant is not now in question, being an Avowry upon the Land by the Statute, not by the hands of the College as very Tenant; but on 11 Co. 71. Magdalen College case: on Dyer 255. b. Hob. 125. the Court doubted, and inclined that albeit the College be a Spiritual Corporation, within 32 H. 8. Cap. of Wills, yet they are lay Corporations, and so agreed in Dr. Patricks case, 2. Feoffment in Mortmain is good, notwithstanding 34 Ed. 1. St. 3. pag. 71. against the Feoffor, only defeasable by the Lord of the Fee. Et adjornatur. (41) Mortmain.

Wakeman *and* Waker.

(42) Tithes.

ON settlement of a Manor and Rectory that consisted only in Tythes, there was a Proviso to Lease the Manor or any part of the Premises for 21 Years or 3 lives, reserving 5 s. per Acre Rent, and Lease made of the Rectory by Lloyd the Father, that made the settlement to himself for life, the Remainder to the Son for life, the Remainder, &c. to which the Defendant pleaded that the Rectory was only Tithes, and so not within the power: to which the Plaintiff demurred. 1. The lessor avers the Rectory contained 3 Acres, which is denied by the rejoynder, which is an Issue. 2. The lease is to be enjoyed so long as the lessees pay their Rent; which by Hale Chief Justice is no abridgment of the power, for its not gone upon the breach of Covenant, but the Trustees on recovery are to stand seised to the use of the lessees so long and longer. 3. The principal point was if the Rectory without Land be within the power: and by Hale Chief Justice on 32 H. 8. Cap. and 13 Eliz. Cap. this is an abridgment of the power, as to so much as in the Case, Pasch. 10 Car. 1. Cumberfords case, 2 Roll. 262. of the Manor of Cumberford, power to lease the Premisses, reserving the accustomed Rent, warranted a lease of Woods never let before, at small Rent; and resolved by the two Chief Justices in the Court of Wards, that the lease was good, and not exempt out of the power; but the power being general, where a Rent can be, it must be so, else not, so here, reserving 5 s. per Acre, must be intended of such things as consists of Acres: and its all one in settlement on Marriage, or for valuable consideration, as here, and where its on a voluntary settlement, and this being an elder Brother, to avoid the provision for the youngest. Adjornatur. Post. 547. pl. 54.

Seaman *and* Warman. *Friday*, November 12.

(43) Chapels.

IT was said that A. possest of a term for Years, assigns it to B. &c. in trust for his Wife Julian for life, and after her decease, to her Issue in Tail for the residue of the Years unexpired, on death of the Issue within the term for J. S. for the residue; Julian died having Issue a Daughter, whose Husband and the Administrator sues in Chancery for the term against J. S. who hath all the other Titles of the Remainder, and the Administrator of Julian: and the Lord Keeper

Finch

Finch inclined the Remainder good to J. S. being not disposed nor sold; but it was referred to Grimston Master of the Rolls, and Justice Rainsford, on whose opinion the Decree was for the Plaintiff, contra.

Dominus Rex and Bents.

IN Information against the Defendants for intermedling with the Execution of a Warrant of the Justices of C. B. before they had taken the Oaths of Allegiance, and of Baily against the form of the Statute 27 Eliz. Cap. 12. Bigland excepted in arrest of Judgment, that the Defendant was but a Special Baily, and so not within the intent of the Statute, no more than any other that comes in aid; sed per Curiam he that comes in aid meddles not with the Process, nor Special Baily that is so by nomination of the party: but here it doth not appear but that the Defendant is a Sheriffs Baily Ordinary: and 2 H. 4. 4. pl. 12. in Sir Edward Cooks case, 2 Car. 1. in 4 Inst. 267. a Patent to Execute all Process within an Hundred in Buckingham, 2 Inst. 452. was in the Exchequer debated and adjudged void; and this being such a Baily, and the Patent now in question in C. B. Adjornatur. (44) Sheriffs.

Dominus Rex and Fenton, *and* C. Ante.

IN Information against Five for absence from the Church, they all pleaded that they nec quilibet Eorum absentavit. Sir Thomas Fanshaw for the King replies, That Three did absent, and no continuance by idem dies, nor no mention of the rest, which was excepted in arrest of Judgment; which in Information for a Riot, were ill: but these were as several Informations, which are now used for Bawdy-Houses, and other misdemeanors, and Inmates, but were heretofore quasht, because the offence of one not repairing, &c. was not the offence of the other: but in the case of disorderly Houses such several Informations have been ruled good; and it would be mischievous to avoid this, albeit this be a discontinuance as to those omitted, yet not as to those convict; and its sufficient to enter a Nolle Prosequi as to those omitted at any time; and Judgment is given by parcels as they come in and plead; and Judgment pro Rege. (45) Religion.

Snell

Snell *and* Webberly.

(46) Slander. I Know what I am, and I know what the Plaintiff is. I never Buggard a Mare; per Curiam albeit no Grammatical affirmation is a sufficient scandal, being found with such intention, and being such in the Judgment of the hearers, the Jesuitical speaking will not excuse; and Judgment for the Plaintiff.

Dominus Rex and Stonehouse.

(47) Forc. EX motione Serjeant Crook against Restitution upon an Inquest found of a forcible detainer, having traverst and pleaded not guilty of the force, the Court granted it, being an outragious force, and said, that albeit on 31 Eliz. Cap. they must stay Restitution upon plea of Three years possession, yet on 8 H. 6. Cap. its at discretion, and they granted Restitution, and awarded an Attachment upon the Indictment here for breach of the Peace.

Bowls *and* Langton.

(48) Slander. EX motione Withens, the Court refused to grant a Procedendo on calling the Plaintiff Whore, because the words as appeared by Affidavit were not spoken in London, but in Surry, and the parties not living in London, so not within the custom of London, and the last Rule for a Procedendo was set aside.

Hony *and* Daniel *and* Uxor. Ante.

(49) Baron & Fem. IN debt on Judgment, suggesting Wife was Executor of Kempster, and that they wasted divers Goods, & converterunt ad usum suum proprium; which per Curiam is well enough, and not like Trover against Baron & Feme ad usum suum proprium, which is ill; but here the wasting is the main. But, 2. It was debt against the Executor of K. the Executor of B. and on Issue that K. never Administred as Executor, Judgment is de bonis Executoris, which should be Testatoris si, &c. which per Curiam is Error; and Judgment for the Plaintiff, Nil.

Wakeman

Wakeman *and* Waker. Ante. pl. 544. 42. *Saturday*, November 13.

(50) Tythes.

SAnders for the Defendant, that the Rectory may be let on Cumberfords Case, the Power being to let all or any part; and had the Rectory been let with the Land, it had been well enough, and the reservation is not material as on settlement of Pasture and Meadow, power to let, so as it be reserving 5 s. per Acre of the Meadow, here the Land might be generally let without any reservation, and so as he reserved 5 s. per Acre is but in case Acres be let. 2. The Plaintiff avers that the Rectory contained three Acres and no more; to which the Defendant rejoyns that there was not three Acres nor any part thereof, and hoc paratus which is ill, being a full Issue. Pemberton contra, that it contained three Acres and no more, implies a content of more, which must be answered; and therefore saying there was not three Acres, nor any part, is no full Issue. 2. As to the power its qualified by the so as it be 5 s. per Acre, as on power to Lease for three lives, as in Sir Richard Temples Case, who made one for the life of the Lady Baltinglass his Sister, and thereby destroyed the settlment; and had the Proviso been that if the Father let any part of the Premises at 6 d. per Acre or any part here, the Rectory would not have been within the power, and on 13 Eliz Cap. Lease of possessions usually let, extends not to Fairs, albeit, before anciently let, as 2 Co. Jewells Case, especially this being a settlement for value, and not voluntary, they shall be restrained of leasing; and in Sir Richard Temples Case in C. B. Proviso to Lease, and that Feoffees stand seised to use of such lessee, so long as he pay his Rent, adjudged that unless he pay his Rent no use doth rise, and thereupon was a suit in Chancery to examine Witnesses of the paiment, and this is a limitation, and so needs no demand. Wild Justice remembred not this; Hales Chief Justice denied it, and said the clause that Trustees stand seised so is not necessary, but Redundant to explain that they shall not have it absolutely, but on the terms of the Lease, not that they should have it thus qualified, for then on every breach of Covenant, the Estate would cease; it was only to declare that the lessees should be liable to pay their Rent to him in the Reversion, and this is but an affirmative clause which cannot qualifie the Estate nor restrain the Estate, for that riseth before, and this the Court agreed; and had the Rectory

rory contained any Glebe, the Lease would be good on reservation of 5 s. per Acre as to the Land, which is all one with this, but if it were upon an Act of Parliament, as on 13 Eliz. Devise reserving accustomed Rent, is as to that which had an accustomed Rent, and will not enable to devise that which hath no Rent; contra of a general Power reserving Rent; but if the Power had been to devise the Lands only, it would not extend to the Rectory, but being general, as 8 Co. Whitlocks Case, the latter clause shall not restrain it, and here its to devise all or any part of the Mannors and premises, so as 5 s. per Acre be reserved; and were there nothing but Mannors and Rectories it would be a strong case against the Defendant; but here being other Lands to satisfie the word Premises, it is the more doubtful: Also the Perquisites may be of great value as Common or Estovers, which are as devisable as the Acre to which they belong: Also Houses may by this power be let, and yet they are not Acres. Sed adjornatur.

Rouse *and* Roberts. Ante.

(51) Remainder.

ERror of a Common Recovery on settlement by Anthony Rouse, to Charles for life, and if he have Issue, at death to such Issue, and if Charles die, living Wife Mary, to use of Mary; if Charles survive, then Remainder to Richard the Brother: Charles as Vouchee suffers Recovery by Attorny within age, and whether Charles be Tenant for life or in tail, Anthony may bring this Writ of Error, but Charles is but Tenant for life, and the Remander after his decease if he have Issue, to Mary, and Issue of Charles by Mary his Wife is contingent as to Mary and the rest, in which case there being no Issue Male, the Use results to the Plaintiff as of this old Estate; and albeit, Mary be yet living, yet if this be an Estate tail in Anthony in Remainder, he may bring this Writ of Error, on 9 Rich. 2. Cap. 3. so Jennings Case, and 2 Co. Marquess of Winchesters Case. Symson for the Defendant, In the Writ of Error the settlment is to Charles for life, Remainder to Mary if he have Issue after Maries decease; if Issue, the Remainder to the body of Charles, and for want of Issue all to Wife for life, Remainder to Anthony, which is destroyed by the Recovery of Charles Tenant for life, and so a forfeiture, for which Anthony cannot Enter, but the Wife; but per Curiam, though it be forfeiture, for which Anthony cannot enter, yet he may have a Writ of Error whether the Estate of Anthony be in contingency

gency, and be destroyed by the Recovery, yet he may have a Writ of Error; or if it be not, but were the Writ of Error brought by the Heir of Anthony on the Entail, it would be more doubtfull: & per Curiam, Judgment for the Plaintiff, but Adjornatur, till it appear that this Writ against the demandant be not by Collusion, for Charles may be Tenant in tail, and have sold to a Purchasor, or only a voluntary settlement, as was said, to the Younger Brother of Charles his use.

Drew *and* Branly. Ante.

(52) Rents.

PER Curiam, the Executor shall have the action upon the contract for Rent, and not the Administrator de bonis non: and Judgment in two Causes for the Plaintiff.

Browning *and* Honywood.

(53) Covenant.

IN Covenant on Feoffment and grant of Bishops Lands, breach assigned that the Defendant had no good Title, and demurrer thereon; the Court conceived this will not make any express Covenant, but Dedi will, and so Reservando: and Judgment for the Defendant, Nisi.

(54) Administrators.

DArly had Issue Susan and Ann by one Venter, and B. a Son by another Venter: Susan Married Waters, and had Issue John; Ann Married Haddon the Plaintiff in the Spiritual Court: Waters made Susan Executor, and gave her the tuition of the Son John; Susan died, and then Administration is committed to Haddon, and the Son of Darly sued to Repeal it. And Wingfield plaied a Prohibition, but per Curiam this being but an Administraton during Minority, is not within 21 H. 8. Cap. 5. §. 3. 2. They conceived Brother of half blood nearer of Kin than Uncle or Aunt of the whole, and unless the Ordinary commit to the nearest, first, no Prohibition lieth, but in Equali Gradu it might, but denied here being only during Minority.

Dominus Rex and Boot. *Monday.*
November, 15.

(55) Trades.

HE was indicted for using the Art of a Brazier contra 5 Eliz. Cap. 4. not averring it a Trade then, & ubi revera he had not served seven Year according to the ancient custom in the Town of Nottingham, after Verdict this was excepted in arrest of Judgment, & per Curiam, its ill both in the Averment, and also in making the necessity of service to a particular Town, whereas it should be that he had not served generally any where, & Cessat Judicium quia the Indictment est minus sufficiens, or else Judgment quod eat inde sine die.

Woollhouse *and* Blackman.

(56) Executors.

IN Covenant the Defendant Executor pleaded that the Testator was in debt per Scriptum suum Obligatorium, not said Sigillat. and Judgment thereon had, and no Assets ultra; to which the Plaintiff demurred: Because 1. its not said Sigillat. and so shall be intended, devenit obligat. per parol; sed non allocatur, for in C. B. its always so declared, albeit, here its per Scriptum Sigillat. in B. R. 2. Its not averred pro vero & Justo debito, which per Curiam is needless by the Executor, but the Plaintiff must aver it by fraud, as Palmer and Lanson and Wakemans Case. Judgment for the Defendant.

Biggen *and* Bridg. Ante.

(57) Days.

COryers on 3 Cr. 702. Humble and Fisher conceived that to enjoy from the 3d. of Feb. usque festum St. Mich. is exclusive of the Feast of St. Mich. so Yelverton 74. especially on demise of Tithes. Holt for the Plaintiff, Michaelmas must come before the Rent is due; and albeit the Rent be payable twenty one days after, yet these twenty one days are not allowable for the last day, but its payable on St. Mich. as a Rent in debt on Obligation, conditioned to enjoy, paying the Rent, &c. Twisden and Wild inclined this was ill, but condition to pay Rent would include the day. Sed adjornatur.

Dominus

Dominus Rex and Baker.

EX motione Sarjeant Stroud to ſet aſide later Orders of Baſtardy to charge the Defendant after an Order of diſcharge, which was not the next Seſſions after the charge, of the reputed Father, the Defendant, being then beyond Sea, but it was the next Seſſions after the Defendant returned from beyond Sea, and had notice of the Order of charge; but this not appearing in the Order of diſcharge, that he had no notice or was beyond Sea, Adjornatur; but per Curiam, elſe did this appear the Seſſions after notice is the next, on 18 Eliz. Cap. 3. (58) Baſtardy.

Kirby *and* Cutwine.

IN debt on Obligation, condition to appear before his Majeſties Juſtices of B. R. at Weſtminſter, the Defendant pleads 23 H. 6. Cap. 10. and that this was in alia forma, being on limitation, which was returnable Coram nobis apud Weſtminſter, and not ubicunque, as Originals; but ſuch a Bond would be good in C. B. but before Juſtice of B. R. its ill, and ſhould be Coram Domino Rege, and this apperance elſe may be at the ſide-Bar before Juſtices; but being to anſwer the Plaintiff at the Return of the Writ, the miſtake in the Stile of Court is not material, the Statute being to prevent frauds in Sheriffs, taking Obligation to themſelves not to regard ſuch miſtakes, which vary not in ſubſtance, as ad reſpond. to ac etiam Billæ, for in placito Debiti, which is ill; but Judgment for the Plaintiff. (59) Sheriffs.

Smith *and* Aſton. *Tueſday*, Novemb. 16.

IN Chancery it was ſaid Finch, Lord Keeper, held that power to revoke by deed or Will under Hand or Seal, was well executed by a Will ſubſcribed with the name of the deviſor, albeit never ſealed, there being a full intent of the deviſor appearing, who had the whole diſpoſing power, eſpecially in equity where the ſtrict rules Co. Scroops Caſe are not neceſſary, and ſo was the Counteſs of Oxfords Caſe, and Cumberfords Caſe, 2 Roll Abr. 262. tit. Powers §. 15. (A.) and a Decree was accordingly. (60) Powers.

Merryweather *and* Mountford.

(61) Admiral. EX motione Den the Court granted Prohibition to the Admiralty, in Libell against a Ship for Tackle bought in the Thames, of the Intestate, supposing it in the suggestion Infra Corpus Comitatus.

Masters *and* Wood.

(62) Trespass. IN Trespass of Assault laid, and tried in Somersetshire, the Defendant Justified by Warrant to the Sheriff of Dorset, and that the Plaintiff endeavoured to rescue himself, and Issue de Injuria sua propria; after Verdict Gold praied Judgment, this being aided by 16 & 17. Car. 2. Cap. 8. §. and so resolved in Croft and Winters Case; the Court were strongly contra, that the Statute intended the Trial where the cause of action ariseth, and so resolved; in Stirk and Bates resolved the trial was well where the Issue arose; and Wise and Adderlies case, in C. B. Trin. 26 Car. 2. was over-ruled on the first motion. In debt on Obligation, the Defendant pleaded Feoffment in another County, and tried where Action was brought and held good. Sed adjornatur.

Dominus Rex against Bents *and* Watson. Ante.

(63) Sheriffs. BIgland in Action upon the Case against the Defendants, for executing Office of special Bailifs nominated by J. S. not being sworn on 27 Eliz. Cap. 12. §. 2. excepted on Jones 249. that this relates at farthest 14 Ed. 3. Cap. 9. but to Bailies of Franchises, and not to such special Bailifs; which the Court agreed, beside Twisden Justice, who conceived that the words, no other person or persons shall intermeddle till sworn, doth include all; but the rest conceived this refers to the subject matter, viz. such persons as ought to swear usually as Sheriffs Officers. And Judgment for the Defendant, Nisi.

Ellis *and* Audle. Trin. 27 Car. II. Rot. 678.

(64) Officer. IN Covenant by the Defendant to pay 83 l. per An. for farm of the Dutchy of Lancaster to be Bailiff, and Return Writs, &c. he sets forth the Statute 6 Ed. 6. Cap. 16. and that so this is void; to which the Plaintiff replies, he had not paid his Farm; to which the Defendant demurred: and by Sanders, albeit, Bailiff of a Franchise may make a Deputy and allow

just

just Fees, yet he cannot on grant of this Office reserve a Rent, which is an occasion of Rapine and Extortion, there being a necessity upon the Bailiff to raise such sums; the Court conceived the old Statutes, that no Baily-wicks shall be let to farm doth not make the Covenant void, as 23 H. 6. Cap. 10. but by Pemberton for the Plaintiff, this is an Office of Inheritance, 2 Inst. 190. or rather a Franchise consisting of divers Perquisites, as bona Felonum, &c. and the Deputy hath quid pro quo; and the Statute was made against Officers of Justice, not of profit, which arose by the Kings grant, not by the serving of the Writs; and the reservation shall be intended for that which it may be reserved for, and Rent might be reseved on the grant of Felons Goods; but per Curiam, this is like the extortive usury, where the Usurer beside the money sold a Dagger. 2. These Bailywicks are in the King as Duke of Lancaster, and by him granted over to the Paintiff at a lesser Rent, which per Curiam is an Office of Inheritance in the King, and consequently his Patentee is exempted from the Statute; but this should have been specially pleaded by the Plaintiff, for it doth not appear here the Plantiff hath any Office of Inheritance, and the Court gave leave to mend the Replication, or discontinue. 3. Albeit, Sheriffs may let to Farm, yet Bailiffs of Franchise cannot; and though no Statutes make collateral Covenants void, yet consequently they do by voiding the Lease. 4. The grant by H. 4. of a Return of Writs within his Fee and Execution thereof is a mischief that every little Quilet and place should have this priviledge by, & Adjornatur.

Welch *and* Wale. Ante. Trin. 26 *Car.* II. Rot. 244.

IN Replevin the Defendant makes Conusance as Bailiff of Newport, of whom Trinity-Colledge held by fealty, and Rent of which he was seised as by hand of the very tenant on which Issue is joyned, the Tenure being taken by protestation; and Special Verdict find Newport seised 2 & 3 Ph. and Mar. and then infeoft Trinity-Colledge, reserving, &c. and were seised by the hands of Master, Fellows and Scholars and their deputies, 1 & 2 Ph. and Mar. Cap. 8. §. 50 or 53. that it should be lawful for twenty Years to convey to a spiritual Corporation reserving any Tenure without penalty of Mortmain, and that this was repealed by 1 Eliz. Cap. 1. and if on the whole here were sufficient seisin for the Defendant. Sarjeant Barwell for (65) Seisin

the

the Defendant, this being an Avowry on 21 H 8. Cap. the seisin must be confest, being but to avoid encroachment; and its not material whether they were very tenants: For the Tenure 2. is admitted by Traverse of the seisin, which is sufficient to make very tenants. 3. Albeit, a Tenure in Frankalmoin be reserved, yet here its not found the Colledges are a spiritual Corporation, and Dr. Patricks case resolved it shall not be so intended, and so no such mesn Tenure can be reserved, especially not within this Statute 1 & 2 Ph. and Mar. to take away the former Tenure of the Lord that was Donor, and turn his Rent into a Rent secke as it would do, and Dyer 255. was only upon a devise, and being of houses in London, was good by the custom and needed not the aid of the Statute, and 1 Co. 25. and 11 Co. 71. saith it was not within the letter, but taken by equity of the Statute, in favour of learning, and to support the devise; which shall not be construed to destroy the Lords ancient Tenure. Buck for the Plaintiff, that the Statute saves not all Rents and Services, but all Rents Service only; and this is not a seisin by the hands of very Tenant, and at Common-Law the Avowry must be by hands of very Tenant; 9 Co. 22. & 21 H. 8. Cap. of Avowries gives only Election, but still it must be general, or on very Tenant; and here Issue is on very tenancy. 2. This would be a good devise to a College, Hob. 123. as Spiritual Corporation 1 Leonard 38. they may take Appropriation and Frankalmoyn, 1 Inst. 95. and here being no Licence of Alienation found, if this be no Spiritual Corporation the King is intitled to the Estate of the College, which is of greater loss than of the Lords service. Hales Chief Justice said Dyer 255. b. is close to this Case, and the consequence of construing it otherwise would be dangerous to create a Mesnalty. But 2. this Mesnalty doth not extinct the Lords Tenure, but he may still charge the Lands for it, albeit, not the person of the tenant: 3 Trin. College is very tenant to the Bishop of Ely, and he tenant to Newport. 3. It should be found what the Corporation was, as that it was given to maintain Grammar-scholars, as in Dyer 255. b. also this is an Avowry upon them, as upon Lands liable to the distress, and is ill, but if it had been only on the Lands, the seisin by hands would not be necessary, and consequently the Issue on seisin modo & forma is not material, nor the pro ut, &c. which is all one would refer to seisin generally, and not to seisin by hands of very tenant: Also all Colledges had some Divines among them: And Judgment for the Plaintiff, on Allens Case,

albeit, the nature of it be not found if it have any thing of spiritualty

ſpiritualty its ſufficient within the equity of 1 & 2 Ph. and Mar. Cap. 8. as the Hoſpitlers who were next; but Adjornatur for an accommodation to pay arrears, &c. 4. The Statute is a private agreement, as a Statute that confirms the Eſtate of B. againſt A. doth not alter the title of any other, albeit there be no ſaving.

Jevan *and* Badilee. Trin. 27 *Car.* II. Rot. 1385.

ERror of a Judgment in C. B. in Dower againſt Robert and Ann of two Houſes, as to one Ann pleaded n' unques ſeiſie que Dower, as to the other ſhe pleads ſhe is not tenant, but one Richard; and Robert pleads non-tenure as to both, and its found that Ann is not tenant of one; and as to the other that the Husband was ſeiſie que Dower, and its found that Robert was tenant only of one Houſe, and the Judgment is of the third part of both, Which by Hales Chief Juſtice is Error, for Quacunque via data, ſhe can have only a third part of one Houſe, for the Court will not intend them ſeveral tenants, being not pleaded, which would have abated the Writ, by ſaying Ann were ſole tenant of one, abſquehoc, that Robert had any thing. 2. This Court, as 3 Ed. 3. will on Error on Plea in abatement where the Writ is affirmed good, proceed here; ſo upon a Plea in Bar adjudged for the Defendant below, if Reverſed, here the Court will proceed for the Plaintiff, but the Court cannot award a Ven. Fa. de novo after Judgment below, nor give on Reverſal ſuch a Judgment as the Court below ſhould, which hath been diſuſed above 200 Years. 3. This cannot be amended in C. B. becauſe it is uncertain to which Houſe each Plea is pleaded; and the Verdict as to one Houſe in the Occupation of J. S. is no ſufficient certainty; but if it had been of Lands or Meſſuages by name it would be well enough, and reverſed, Niſi. (66) Dower.

Dominus Rex againſt Lord Fitzwalter. Ante. *Wedneſday,* November 17.

IT appearing that ſix Jurors were of opinion the King had ſome right, and ſix contra, they agreed to caſt Croſs and Pile with this caution, that if any man were diſſatisfied they might alter next morning, and thereupon a privy verdict (67) Verdict.

dict was given, and the next morning the six Dissenters that were of opinion the King in part had some right, met in Westminer-Hall and debated the matter, and concurred to the Verdict in Court for the Defendant, and it appeared no mans Judgment was induced by the Lot, yet because this would alter the Trial by Verdict, to a trial by Lot and Order, the Court, all four Justices una voce, set it aside, and so it was said to be done in Chancery this Term in Sir Francis Rolls Case: And so Hales Chief Justice said he did by another Trial in Guild-hall, for albeit the Jury may depart from their Verdict that was privy, yet thereby they are under a pre-engagement to stand to it, and though there were no misdemeanor in the Jury, yet a new Ven. Fa. granted per Curiam.

Jenkinson *and* Allenson. Ante.

(68) Arbitrement. DEbt on Obligation, condition to perform Award, ita quod it be ready to be delivered to the partis: On no award pleaded the Plaintiff sets it forth; and breach for non-paiment, but doth not aver it was ready to be delivered, which per Curiam is necessary, and being not averred, is ill; but the Award being not excepted to, and the breach for money, the Court granted leave to discontinue or amend, paying Costs, albeit there be other remedies by debt on the Award.

Eustace *and* Keyting.

(69) Bail. EX motione Jones Attorny General to quash a Writ of Error by the Bail in redditione Judicii against Principal as in Execution against Bail, the Court agreed the Writ should abate: But Hales Chief Justice said that in Pools case, Mich. 1649. and Mich. 23 Car. 1. Rot. 217. in the case of Scot and Jeofferies, it was resolved that by Error brought by Principal and Bail, the Records are both removed; and also by Writ of Judgment against the Principal, and Execution against the Bail brought by Bail the Record against the Bail is removed, but per Curiam the Principal Judgment is not removed, nor no new Error, quod coram vobis lieth thereon. Here 2. lieth no Sc. Fa. against Bail, but only rule to assign Errors on that Record; and on Default thereof a Rule for Execution in Ireland; and no Rule can be here, because the Writ is abated, and there can be no special Rule to proceed in Ireland, as in cases where the

the Record is not removed, or a Judgment of Affirmation, &c. where its of Judgment before A. that was before B. the Record is not removed. Also 3. no Sc. Fa. lieth to the Sheriff of Middlesex on the Record here, as on removal from Sarjeants-Inn, because though the Judgment in Sc. Fa. against the Bail be removed, yet the original Recognizance is in Ireland, and its not entred on Record here; so the Record is only here to some purpose as to warrant an Entry, but not to warrant Error, quod coram vobis, which lieth not in Exchequer-Chamber, yet the Record is vertually there; so in Parliament, and the Court agreed to certifie there was no Record here. Sed adjornatur.

Bradshaw *and* Andrews. Trin. 27 *Car.* II. Rot. 1244.

IN Action upon the Case, on false Return of non est inventus by the Sheriffs of Galloway in Ireland, it was Averred the Sheriffs at the time of delivery of the Capias had the person in Custodia at Galloway in the City of Dublin, and the Action is brought in the County of the City. Sanders assigned for Error after Verdict, that albeit, by new Habeas Corpus the Sheriff may have a Prisoner out of the County, yet on a Capias delivered to him out of the County, he is not bound to hold him there, so upon Latitat, &c. which is no warrant to the Sheriff to take but only within the Bailywick, and to this the Court inclined: But adjornatur, because being after Verdict it must be intended he was legally in custody. (70) Sheriffs.

Hodgskins *and* Thornbury, *&c.* Ante. *Saturday* Nov. 20.

THe Bishop of London seised in Fee demised Copyhold to Th. H. and his Wife, who entred and were seised, Anno the Wife died and the Plaintiff seised by the survivor, and devised to Timothy Robinson for 15 Years, who entred and afterward redemised to John R. and Rebecca two of the Defendants, and Rebecca married Thornborough another Defendant. And in debt for Rent the Defendants pleaded that the Plaintiff by force entred into part of the back Garden: Judgment si actio: The Plaintiff replies that Timothy Robinson the devisee made an under lease to Knowles of the Back-Garden, who (71) Rents.

who assigned to the Plaintiff by vertue whereof he entred; to which the Defendant rejoined idly, and the Plaintiff demurred. And by Wild for the Plaintiff, though here can be no apportionment in this case, yet the re-demise of part is ground of an apportionment, because his entry was lawful and by the Defendants consent; and it were against all conscience, the Rent Issuing out of the profits, that the lessee should hold discharged; and albeit this be not a Rent within 18 Ed. 1. Cap. 1. of Quia empt. terrarum, yet its a Rent apportionable of Commonright. Extinguish. Br. 48. mentions no Book to warrant it; and in 9 Co. 134 Ascues case, where a Seigniory may be extinct for part, it cannot be suspended for part, albeit the Lord enters by right or by wrong, which is not warranted by the Books cited. Its true that on a Tortious entry the lessor shall suffer for the whole; and all the Books cited go upon a Surrender of the whole, or on entries by wrong, and 17 Ed. 3. 56. of a Rent-service is in the point of this case that Rent on assignment of part by lessee to lessor shall be apportioned, that plea being a good plea to the Action, for what it was pleaded that the lessor was seised and not for the whole: Also whereever Entry of lessor is by consent of the Tenant, it was never held in Evidence a suspention; and the resolution in 4 Co. 71. was but collateral, and conduced not to the conclusion, and was induced by Extinguishment, Br. 48. Rainsford ad Idem, That the Rent shall not be wholly suspended, because the lessor enters by title, 1 Inst. 148. so whether the lessor enters into part by forfeiture or surrender, &c. and 1 Roll. 938. Barrell and Andrew is a stronger Case, for when the lessor of Tenant at Will entred, it might be a determination of the Will, and so the lessor entred by wrong; yet to support the Contract, the favour of the Law made it good; but a condition is intire and not apportionable in its Nature, so Owen 41 Extinguishment, Br. 49. but as this case is, there can be no apportionment, there being no Rent reserved on the re-demise, and when the under lessee assigned part to lessor, the lessor was put into the same condition and discharged as the lessee was, else the lessee would have advantage against the lessor notwithstanding his contract with his under lessee; and in 4 Co. 71. its only said in suspention of the Rent, but it appeared not whether it were of the whole Rent or of the part reserved, but here ought to be no suspension nor apportionment. 3. Twisden ad Idem, That the Rent is apportionable or at least not extinct, being a Rent-service, but otherwise it would be of a Rent charge: Also this Entry is by right, being by Licence of lessee, and there is no difference

but

but in words between a Suspension in part, and an Extinguishment in part; as 1 Inst. 48. and in 17 Ed. 3. 50. if the Entry were before the Writ brought, it was in abatement, if pending the Writ, in Bar. And Common, practice hath allowed Licence to be Evidence against a suspension. 4. Hales Chief Justice, 1. That the re-demise to one, under whom the lessor derives, or to the lessor of part of the Land, for part of the Term is clearly no suspension; and it must be agreed also, that where lessee of twenty Acres of equal value surrenders one Acre, there shall be an apportionment where the whole Term is surrendred; yet if there be a condition of re-entry annext, that will be extinguisht and cannot be apportioned: so Noy 126. pl. 545. and consequently this in the case of a Seniory, the Rent is not extinct by Lease for life by Tenant of Fee to the Lord himself, where no Rent is reserved; but where a Rent is reserved there shall be no apportionment, because this is made by their mutual agreement, that Tenant shall have what he reserves, and the Lord what he reserved; but where the re-demise is without Rent, there shall be an apportionment: and 31 H. 8. Extinguishment Br. 48. was swallowed without chewing, for 17 Ed. 3. 56. is an express Judgment that on re-demise of an Estate for life, the Rent shall be apportioned, and so is 16 Ed. 3. Avowry 93. and no difference in the old Books, between a suspension of part, and an extinguishment of part, but the old Books held none could be Lord and Tenant; and therefore if the Father held of the Son, and did Homage to him, the Eldest Son could not take, so Glanvil, but were there a suspension in case of a Lease for life, because in an Assize the Tenant must be named, yet in case of a Term there will be no doubt, but there may be a suspension; the only remedies being debt and distres for Rent; and there cannot be two Eggs liker than this and Darrells Case, 1 Roll. Abr. 938. for in both Cases the lessor had and continued possession after the Rent day: and 4 H. 8. Licence by lessee at Will may by contract amount to a Lease at Will, albeit, perhaps the lessor may Elect the under lessee to be a disseisor or not at pleasure, yet where he doth not, there is no difference, and it was never doubted in Evidence, but that on nil debet Entry by assent of lessee was allowed against suspension; and this would be mischievous to all Neighbourhood between Landlord and else Tenant. 2. Here can no apportionment come in question, because the Defendant by his Plea of Tortious Entry hath put it out of the power of the Court to apportion it upon the Trial upon special Plea; but if the Lease had been to the Land

lord immediately without Rent, there might be an apportionment, but if with a Rent there shall be no apportionment, but the contract of each shall be observed: but this Lease is made to a stranger, and the first lessee remains chargeable to the lessor for the whole Rent, and so the lessor coming in under him that was priviledged from the payment of the Rent, albeit, not from the distress, the lessor shall enjoy the like priviledge, as where the Tenant by Fealty and a Rose alienes one Acre to the Lord, the Rent is extinct: but where one Acre is let by the Tenant to a stranger, there the Rent is multiplied: and the Lord shall have his Rent notwithstanding the assignment by stranger to him: and per totam Curiam Judgment for the Plaintiff.

Dominus Rex and Warner.

(72) Com. EX motione Mr. Attorny Jones, to set aside Rule for Habeas Corpus directed to the Lieutenant of the Tower, the Defendant being there for murder in the Barbadoes, as supposed of his Brother and 80 others at a Dinner; and being an Inhabitant there, is not triable here: and 35 H. 8. Cap. 2. c. 1. doth not extend to foreign murders within the Countries of the Kings Jurisdiction, but of foreign Countries. Hales Chief Justice said that the Statute doth extend to Ireland, and other the Kings Jurisdiction as well as Forreigners, and so is 1 Anders. 262. pl. 289. Case, but being done by Commission of Collonel Andrews Governor of Antego in Domingo, to which Collonel Ayliffe pretends Jurisdiction, as Governor of Barbadoes, the Defendant desired to be tried here or at Nevis, and not there; & per Curiam, a Return awarded of pluries to that intent.

Ridley *and* Pownel. Ante.

(73) Lewes. THE Court Awarded a Ven. Fa. de novo, because grants separalibus temporibus is uncertain, and if any grant were by the Bishop of Bristow after Election, and before 1 Eliz. it will be sufficient to make the Office grantable, else not.

Bradshaw

Bradshaw *and* Andrews.

(74) Execution.

HAles Chief Justice said its Comitat. Galloway in the Margent, and that at the day of the Return he had him in custody in the City of the County of Galloway; but if the Sheriff had the party in the City of Galloway, albeit, the Writ were delivered to him at Dublin, it will be well enough to charge him, and it doth not appear the party was in Dublin when charged, in which Case the Sheriff is not bound to hold him in Dublin; and the Statute 2 Ed. Cap. 5. did intend all Writs should be delivered in Middlesex on Record; and the charge is for returning non est inventus in Balliva, and the Jury have found he was in Balliva at the Return of the Writ, and it doth not appear the party was by Habeas Corpus at Dublin when the Writ was delivered, and it shall be intended by ad tunc ibid. in Custodia, but this shall be intended as it may, that he was then in Custodia at Galloway: and Judgment affirmed, Nisi.

Dominus Rex and Watson *and* Bents. Ante.

(75) Sheriffs.

THE Court on Jones 65. pl. 1. conceived the Statute 27 Eliz. Cap. 12. doth not extend to Bailiffs Errant, nor to special Bailiffs nominated by the party, but Baliffs of Hundreds must be sworn attending at Assizes and Sessions, and should be the persons that should execute all Writs; and therefore the Statute requires that they have sufficient within the Hundred, but an inconvenience hath been found in this, by too great a dependance on them; and therefore the ordinary Bailiffs Errant, or Bumbaliffs are put in. And Judgment for the Defendant.

Hdye *against* Preston *and* Badcock, *&c.*
Tuesday November 23.

(76) Copyhod.

IN Ejectment the Plaintiff shewed Copy of four Acres to save Costs, the Title being on Will or no Will of Sorrel of Essex, but not being able to prove where particularly, the Court gave the Defendant that claimed by the Will, leave to retract the general confession of Lease, Entry, and Ouster as to this, and to have Judgment against casual Ejector.

Morgan

Morgan *and* Rutter. *Wednesday*, November 24.

(77) Error. EX motione Crofts for Judgment on reading Record of debt of Judgment, where a Writ of Error depending was pleaded in Bar, the Court over-ruled the Plea, and said that a Writ of Error is no Supersedeas to a new Original; and though the Judges of C. B. and Exchequer had Reversed Judgment lately by Error in Exchequer-Chamber on such Action of debt, yet the Court said that this would be of mischievous consequence and Reverse many Judgments, and they would not grant restitution upon such Reversal; and they said there was no difference between pleading it in abatement and in Bar, as Chief Justice North held in Exchequer.

Vanacre *and* Spleen.

(78) Church. FInch excepted against Prohibition, on denial of Custom to repair Erith-Church, because Sentence is given as in 1 Roll. James's Case and Noy. and there is no Appeal depending, and it appears not the Custom was specially denied, but a general Negative; sed non allocatur, for it lieth as well after Sentence as before, and whether any Appeal be depending or not; but Adjornatur, to see if the denial were special.

Pauly *and* Wiseman.

(79) Church. SArjeant Newdigate prayed Prohibition in suit against Executor of the Curate of Knockton in Kent, being only Stipendary for Dilapidations in the Arches; on 13 Eliz. cap. 10. to which the Court inclined, but Adjornatur, without stay in the mean time.

Mansell *and the Dean and Chapter of* York.

(80) Prohibition. NOrth prayed Prohibition in suit for Pension granted 1347 to the Abby of St. Agathæ, of the Order of Premonstratences on suggestion that none was ever paid: And 2. that being by grant upon an appropriation, its of Temporal Cognizance

nizance 34 & 35 H. 8. Cap. 19. §. 4. which revives suit only for such Pensions as were paid within 10 years before dissolution, and a Prohibition was granted, Nisi: Pensions being of Temporal Cognizance and Annuity lieth for it, and it hath in a late Case Ante of Walker been ruled to be within the Statute of limitations, and Issue upon scisin within 60 Years was tried last Assizes at York.

Wisse *against* Wisse.

(81) A Stree excepted in Arrest of Judgment, in Indebitatus for 20 l. pro tantis denar. summis quas ei solvisse debuit secundum agreement of the Intestate which may be by deed, and therefore ill; & per Curiam, were this by Verdict intended an agreement by Parol, yet that doth not make any debt, and a general Indebitatus for 20 l. or divers sums of mony, not said for what is ill, unless by the Custom in London; wherefore Judgment notwithstanding the motion of Polyxphen for it was staied.

Dominus Rex and Fenton. Ante.

(82) MR. Attorny praied Judgment in information upon 23 Eliz. Cap. 1. the Plea being that the Defendants, nec eorum aliquis absented, Mr. Attorny replied only as to two of the five, which per Curiam is well enough, the offence being several, and not like 2 Bulster 324. Dyer 353. and Co. Entr. tit. Intrusion nor Information of using Trades, which are one Joynt offence: And Judgment for the King, but the party conformed. Religion.

Harvey *and* Harris.

(83) ON Certiorari of Replevin in Canterbury, Dalby excepted against Nonsuit here after a suggestion made, but per Curiam it may be here as well on Certiorari as on Recordare, &c. and if the party be grieved by the Writ of Enquiry, he may have a second deliverance, and the Nonsuit stood. Replevin.

Dominus

Dominus Rex and Alderman.

(84) Coron. EX motione Sir William Pargitor to ſet aſide Verdict of Inqueſt on Felo de ſe. Hale Chief Juſtice ſaid he knew no caſe wherein the Coronors Inqueſt is not traverſable, but only by an Eſſoyne by Fugam fecit: & 8 Ed. 4. 4. in Traverſe, Br. its held traverſable: and 43 Ed. 3. adjudged that traverſe of Inqueſt of Felo de ſe was traverſable in the Exchequer; and this being a perſon long diſtracted, and done in a Fit, and Verdict obtained by fraud of the Coronor, a new Inqueſt, Niſi. But no Melius can be Awarded on the Statute 34 Ed. 3. Cap. 14.

Boynton *and* Sprignal.

(85) Fines. ON Evidence in trial at Bar of Iſſue out of Chancery; it was agreed per Curiam that by a Fine by Ceſtui que truſt of term of 500 Years to the Vendee of the Inheritance, the uſe and truſt were extinguiſht, though it were ſaid the Lord Keeper Finch held nil operatur thereby in Chancery; and Jackſon the Truſtee, that had aſſigned contra to truſt, was admitted a witneſs to prove acceptance by the Defendant the Ceſtui que truſt of another place in ſatisfaction; and Verdict for the Plaintiff.

Gardner *and* Weeks.

(86) Copyhold. IN debt on cuſtom to have a reaſonable Fine of Copihold of Laleham-Billets in Middleſex, for 29 l. ſet on ſeveral Tenants; wherein the only queſtion was, Whether Fine certain or uncertain, it was under a Years value, and but one Fine on two diſcents on improved value; the Defendant on Nil debet made Title by Fine certain of three Years Quit-rent; Verdict for the Plaintiff that the Fine is uncertain: very hard by Wild.

Syms

Syms *and* Selwood. *Saturday*, November 27.

SIR William Scrogs prayed a Prohibition to the Arches on appeal from the Inferior Ordinary for not delivering the Copy of the Libel, which was controverted in the Arches, whether Proclamation or Reading alta voce in Court be a delivery; which the Ecclesiastical Court conceived it was; and per Curiam a Prohibition was denied, because on 2 H. 5. Cap. 3. the party hath Election to have a Prohibition Quousque Copy delivered, or may appeal for the Gravamen, this being on a Presentment of the Church-Wardens, and having made Election, and the matter of their Cognizance no Prohibition ought to be, but on their declaring such a publication, a delivery contra to the Law, a Prohibition granted, Nisi. (87) Prohibition.

Dominus Rex and Slaughter.

SArjeant Sroud excepted on 22 & 23 Car. 2. Cap. 12. in arrest of Judgment that no Information lieth here for selling Corn contra Stat. on 1 Cr. 643. Bakers Case, but on 14 Ed. 3. Cap. 12. by Polixphen for the Plaintiff, being contra form. Stat. selling by measure not agreeable to the Standard of Winchester, its general and well enough; which the Court agreed, and the unde petit the Corn or value; this on Hub. 245. pl. 303. will not Intitle to a particular Statute, & ex motione Noy 8. Car. 1. it was adjudged that the unde petit how variant soever, is not material: and as in Indictment of Treason contra form. Statut. if there be any, albeit many, the best shall be taken for the King; but if the Statute be recited, then the unde petit is material; but especially this is good for the King, albeit void for the party, this being no Action tam quam, and the offence being Prohibited by the former Statute, albeit penalty be added by the later, that will not hinder; and Judgment pro Rege, Nisi. (88) Measures.

Dominus Rex and Warner. Ante.

(89) Coron. THE Statute of 33 H. 8. Cap. 23. is Repealed by 1 & 2 Philip and Mary, Cap. 10. §. 3. as to Treason, but is in force as to Murder: So Dyer 286. pl. 45. & 35. H. 8. 2. extends not to it, therefore the supposed Murder being done by Commission from the Governor of Antiego, and its not Returned this was done within any of the Kings Dominions, nor on a subject; and the Affidavit of the matter transmitted by Atkins Governor of Barbadoes, doth not appear to be by any Jurisdiction; the Court conceived the Return good, notwithstanding want of place of Murder or Affidavit; but the Fact being per mandatum as accessory, albeit not triable here, on 1 Anders. 195. pl. yet there being no prosecution against the Principal, he is Bailable, and not to be remitted to the Governor of Barbadoes to be tried there on a contest of Jurisdiction. Sed adjornatur.

Dominus Rex and Alderman. Ante.

(90) Coron. THE Court on 8 Ed. 4. 4. Travers per Br. conceived the Inquest of Felo de se is traversable, and so in all cases; but on a fugam fecit, which is on 4 Ed. 1. p. 28. because the Coroner is to Summon all, and those who are met there shall be presumed, being absent, to fly, and the party is thereby Estopt to traverse; and so was the Opinion of Glyn Chief Justice in Barclaies case; but he doubted who should traverse it, because he could neither have Executor nor Administrator; and the Court ordered the parties to traverse it here without quashing. But, 2. In wanting murdravit & ex malitia præcogitata, the Inquest was quasht, and a new one before the Justices of Peace to be: So Coales case, Pasch. 27 Car. 2. in London.

Hony *and* Daniel. Ante. *Monday*, November 29.

(91) Bar. and Fem. DEbt against Baron & Feme on Judgment against them, per nomen of Executors de bonis suis, for Testatoris si, &c. and if none then for 4 l. damnis de bonis propriis of the Husband, suggesting a Devastavit in the Baron & Feme, per

per quod Actio accrevit to the Plaintiff for all. Blinco excepted in arrest, that as to the 4. l. this is ill, the damages being only of the Husband; sed non allocatur, for albeit the first Judgment as to the 4. l. damages be ill, and should have been as to damages de bonis of Baron & Feme, yet until reversed this Action of debt is good enough; but as to the Feme here is no Judgment of the 4 l. nor de bonis Testatoris, nor ut Executor, but per nomen, therefore staid.

Hill *and* Boomer.

(92) Encumbent.

EX motione Tremayn for a Prohibition upon suit to deprive a person Inducted on Canon 1 Jac. for not shewing his Priests Orders on Visitation; which was granted, nisi. but after Masters on 14 Car. 2. Cap. 4. Sect. 13. that every Minister shall be Ordained Priest, excepted against a Prohibition, because 9 Ed. 2. Cap. 13. Priest or no Priest is triable by the Spiritual-Court; sed per Curiam none shall, being in possession, be ousted by any Canon; but this ought to be tried by a Quare impedit, and the Ordinary shall not take this advantage; and a Prohibition granted absolutely.

Kerby *and* Curwin. Ante.

(93) Sheriffs.

IN debt on Obligation to appear before His Majesties Justices of B. R. at Westminster; the Defendant pleaded 23 H. 6. Cap. 10. and that this was alia forma, and the course being only in B. R. Coram Domino Rege ubicunque, this is ill; and so it would be had it been to appear Coram Domino Rege at Westminster, unless B. R. be then sitting there. Sed Adjornatur.

Dominus Rex and the Inhabitants of Fulham.

(94) Ways.

WAllop prayed Judgment upon the Statute 2 & 3 Philip and Mary, Cap. 8. §. 2. because he that hath several Draughts or Plows ought to send one for each to the amendment of the Ways; which Saunders opposed, because albeit a Teem shall be sent for every Plow-land, yet for Draughts albeit a Man have never so many, he shall send but one; sed per Curiam as well he that hath only Draughts, and

no Land, shall send for every Draught one Teem, as he that hath but one Plow-land, and 20 Draughts, shall send 20 Teems; and a Procedendo was awarded; & per Curiam, Meadow or Pasture is Plow-land, within the intent of the Statute, albeit not so yet understood by the Justices.

Dominus Rex and Warner.

(95) Imprisonment. THE Court conceived that on 17 Car. 1. Cap. 10. Sect. 8. they must Bail, Discharge or Remand, and that they could not commit him to the Marshalsea, nor could he be delivered thence but by Habeas Corpus ad deliberand' which must be signed by a Judg, which none ought to do in Vacation upon a commitment by the Court, and thereupon he was remanded.

Lever *and* Hosier *in* C. B.

(96) Lieu. IN Ejectment the case was Sir Thomas Jones, seised in fee, Covenanted to suffer a Recovery of all his Lands in Shrewsbury and Cotton, and a Præcipe was of all his Lands in Shrewsbury, and the Liberties thereof; and whether the Lands in Cotton, that were within the Liberties passed, was the question; & per Curiam a common Recovery is a common assurance, and is to be expounded as an agreement of the parties, and not as Breve adversarium; & per Curiam the Lands in Cotton passed by the Recovery, being all one with a Deed Inrolled according, unless the Wills be as distinct as Parishes: and Hutt. 206. is only of the Lieu conus of Camby; which though it comprehended the Parish and Will, yet neither were named, and therefore ill; these being the more notorious, &c.

Kidder *and* Wall. *Thursday*, January 13.

(97) Days. IN Trespass by the Plaintiff of Assault on Feme 12. April, 1675, the Defendant pleaded former Recovery on Trespass 27 April, 1675. by the Plaintiff and his Wife, quæ est eadem persana & insult. &c. in bar absque hoc, that he is guilty of the said Trespass on 12 Apr. or at any time before or after the said 27th of April; but if the Trespass had been laid the

the 29th of April, or subsequent to the Recovery, then absque hoc that the Defendant is guilty the 29th of April, or at any time after the 27th of April had (so in slander) been sufficient, because the Plaintiff cannot give evidence precedent to the day of the Recoverry, but subsequent until the day of the Declaration Entred, or Bail Filed, he may: and this seems a medium to reconcile the different precedents, when to traverse before or after, and before and after.

D E

DE
Termino Hillarii

27 *Car.* II. in *B. R.* Anno 1675.

Monday, January 24.

Hale Ch. J. & *Rainsford*
Twisden. & *Wild.*

Richardson *and* Desborough.

(1) Legacy.

EX motione Rainsford for Consultation upon Register 58, & 3 Cr. 88. & 666. and 12 Co. 68. Roberts Case, on fully Administred pleaded in suit for Legacy, which being proved but by one Witness was refused in the Spiritual-Court, and Prohibition granted last Term. Ex motione Brampston on Yelverton 92. and Levins now for the Plaintiff in the Prohibition, that unless Prohibition be granted, the Common-Law will be altered, for this is sufficient Evidence against the Creditor, and this ought to be so against Legatee. Twisden said that ever since 5 & 6 Car. 1. Singularis Testis hath been held no ground of Prohibition where the Court hath not Conusance of the Original cause, for this must be tried by their Law, not by ours, where the Jury are also instead of Witnesses. Rainsford and Wild contra, that this is far stronger than Yelverton 92. where the Revocation it self is of Ecclesiastical Conusance, but here the Spiritual Court inverts the Order of the Common-Law, that simple contracts be paid before Legacies; and thus after Assets paied out in contracts they might be paied over again in Legacies: but per Curiam, it was ordered that Prohibition stand, and that demurrer be to the Prohibition.

Groundal

Groundal *and* Waldron.

(2) Prohibition.

WEst excepted against Prohibition to the Bishop of Coventry, on 23 H. 8. Cap. 9. on Citation out of the Dioceſs, because one of the Prebends of Litchfield, the Dean and Chapter whereof hath this Peculier, out of which the Defendant that is cited, is Parson, and sued below. 2. The cause is remitted by the Peculiar to the Superior Ordinary: But by Twisden Justice, the Court cannot take notice he is a Prebend, nor of the remission without pleading it, unless the remission appear by the Libel it self, as it did here, being ratione licentiæ from Peculier, &c. but by Polyxphen, this is only a suggestion of the Libel, and no Letters of remission appear: Also the Peculiar is in the Corporation of the Dean and Chapter; and albeit the Prebend be a member thereof, he is not within the exception of the Statute; but per Curiam the Defendant should plead in the Spiritual Court, that there was no Licence, and untill that be denied, per Curiam no Prohibition; but the last rule discharged.

Hart *and* Malcher.

(3) Execution.

SAnders praied Restitution upon an Execution made out after death of the Defendant in the Writ of Error, supposing the Writ thereby abated; as on death of the Plaintiff in the Writ of Error, it was agreed by all, that it was, but per Curiam not by death of the Defendant, and so is Bulstr and Moor, and Error Br. 84. but there must be a Sc. Fa. against Executors: And by Sanders there was one against the Defendant who is dead, and on a Mortuus returned, there was another against his Executors, the now Defendant there, whose Attorny Malcher was, & per Curiam, Restitution awarded, Nisi.

(4) Encumbent.

PEmberton the Kings Sarjeant praied a Prohibiton in Appeal to the Arches, for damages on Citation by the Bishop of Lincoln of Inhabitant there, now the Defendant to appear at his house in Hatten-Garden in London, which (by mistake) was to shew cause why the Bishop having presented the Defendant, pending a Caveat, should not grant a super institution to the Plaintiff, to the intent to enable him

him to try his Title in Ejectment, without putting him about to his Quare Impedit, because 23 H. 8. Cap. 9. gives suit for damages by debt or Information; & per Curiam, Hale Chief Justice being absent, a Prohibition was granted.

The Parish of Subdeany *against the Mayor of* Chichester. *Tuseday* Jan. 25.

(5) Poor. SIR John King prayed a Mandat to the Mayor of Chichester, to sign a Tax made on the Palace, &c. of the Bishop of Chicehster, being within the Parish of Subdeany, & per Curiam, was it granted, because there can be no prescription against this, and all the Prebends that live in the same close, which is a fourth part of the Town, pay it.

Wigon *and* Garret. Ante.

(6) Powers. IN Ejectment on devise by T. Lord Leigh, Mr. Attorny Jones for the Defendant, said the point was, Robert Earl of Leicester seised by deed and Fine, 21 Eliz. setled on Trustees for paiment of debts, with power by any writing subscribed to alter, determin and limit new Uses, 32 Eliz. there is a deed of Covenant to levy to new Uses persuant to the Fine, and 33 Eliz. a Fine is thereon; and whither this be a sufficient Execution or not, is the sole question, and he held it was not. 1. Here being no due observation of circumstances or substance, before 10 Co. 144. Scroops Case it was doubted that an Act, unless it referred to the Power was no revocation, but that case allows a revocation by implication; but still there must be a substantial determination: and also a due observance of circumstances, and in Hub. 312. Kibbots Case, there is no circumstances to be omitted. 2. In this power, writing an Indenture subscribed and sealed by himself is requisite; and the Deed alone nor the Fine alone nor both joined are no sufficient Execution, for the Deed wants substance, not shewing the Will of the party to determin the Estates or limit new ones, but refers to a future Act to be done, which is at the parties Election to do or not; and had there been a Will precedent to this Covenant or Feoffment, as 1 Roll. 615. Montague and Jeofferies, this would not amount to any revocation: Also the Fine by it self wants all the circumstances of indenting and sealing by the party, albeit, it be a writing, and what they will not do separate they

they cannot do jointly, being not communicable to each other, albeit they make but one Conveiance, yet its contrary to the words of the power, that both should be a revocation, for that is to be by deed, and not by deed and Fine as on setlment with revocation as here, if after deed should recite the power, and that he would not pursue that, but another way which is the effect of this Covenant that doth not revoke, but refer to levying a Fine which is out of the power; and this on Power to revoke by deed may be executed by a deed that doth not revoke, but by a farther Act that doth; men may do by several Instruments, that which they may do by one, so all be delivered at the same time, as to anner a Condition or a Revocation, and these several Writings are as one Conveiance; but in the case in question the deed was in one Year and the Fine in another, and had a deed of Revocation omitted some circumstances, and another deed delivered at another time supplied those defects, these executed at several times cannot make up any pursuance of the Power: Also had there been a Fine precedent which had extinguisht the Power, it would not be set up and revived by any subsequent declaration of the uses. 4. These Instruments are of different natures, and so are not within this; the Fine is the Act and Record of the Court, the other the Act of the party, which cannot both be said any Writing sealed by the party: Moor pl. 506. Perrots Case, was adjudged no Execution of the Power, and so can be no authority against this; Powers of Revocation are favoured as far as possible, not to waive any substance or circumstance of the Power; and in this case there was no Estate but only a bare Power reserved, which 6 Co. 33. being only by way of devesting shall be taken strictly, and in this point is Hut. and Har. against Crawly and Vernon, in 6 Car. 1. in C. B. adjudged Mich. 9 Car. 1. by three against Vernon Parker and Ingraham's case, where on setlement of Catesby, Bargain and Sale by Tenant in Tail; Remainder in fee being not Enrolled, was held no Revocation, because the Tenant in Tail might create a base Fee. 2. Without Enrollment the deed was extincted but Incoate, and the Fine before Enrollment the Power, and here the words and intent of the proviso are for the Defendant. Hales Chief Justice, on the close and nise construction of the case, there is something that favours the Defendant; the deed alone is no Revocation, because the party may vary from it; the Fine is none, being no deed, but both are a Revocation; as Kibbets Case, which was a Power to revoke by any Writing delivered in presence of three: yet a Will with

those circumstances by death of the party is a good Revocation, yet the Will alone was no Revocation, but might be cancelled, or new ones made; but by death of the party it becomes a good Revocation: two Acts may concur to make that good which either cannot; the Will wants substance, and the death wants circumstance; and albeit these be Acts at several times, yet Juncta Juvant, as that deed shall be no Revocation till paiment of 100 l. by J. S. neither of these are alone any revocation, yet both Acts compleating each other they are sufficient; so Ferrers Case, A. leaseth to B. and after Covenants to convey to B. in fee, to the intent to be Tenant to the Præcipe, hereby the term of B. is extinct, yet by subsequent Recovery the whole is interpreted to be no Merger, albeit several Instruments at several times being only consummating one of another, this is no revocation by Vertue of the Fine, but by Vertue of the Covenant to levy the Fine which is hereby consummated; had the Fine been first, and the declaration by deed of uses after that, it would be good, but the power is extinct; as Puttenhams Case, but here as the deed of Covenant had priority of time, so it shall have priority of nature when all is consummated. Twisden, The intent was plain to revoke, and these powers being now in all Estates are to be favoured: Also where the Fine is first levied, if there were an agreement precedent so to do, and that it should not extinguish, it will not extinguish. Contra by Hales Chief Justice, and that on power to make leases for lives by deed, it was held most safe to do it without Livery, albeit at Common-law, Livery or Enrollment is necessary; and so in Rogers Case of Blandford Forum, it was ruled by advise of Barcly, Rolls and three or four more of great practice, where it was done without any Livery; and the true reason of Ingrahams Case, was that this arose not out of the power, but out of his interest, as Wilds Case, Co.

and this is no sufficient reason to support the power without Enrollment, because it was intended to pass an indefeasible Estate in fee, which could not be out of the Estate tail intirely, and the construction was for the best advantage for him for whose benefit its made, where the power works one way, the interest another: Also here is no Estate left in the case in question, but barely a power: Also by Wild Justice this is but a volutary Conveiance, and this would be no forfeiture, as Moor pl. is; and in Feoffment of Mannor the Services pass not untill the Livery, but by this coming after doth, and the Mannor is not destroied. Judgment for the Plaintiff, Nisi.

Vanacer

Vanacre *againſt* Spleen. Ante.

ON Libel for not repairing a part of the Church-yard-wall; which the Defendant there, the Plaintiff here ought to do by preſcription, which was not denied by any ſpecial allegation, but Conteſtatur Negative; which by Dalby againſt the Prohibition is but the general Iſſue; but per Curiam the Plaintiff muſt prove every thing in his Libel, and therefore this is in Iſſue; and a Prohibition granted to try the preſcription; and this Libel may be by Parſon as here or by the Plaintiff. (7) Church.

Hartpool *and* Kent. Ante.

IN Error of Judgment in Ireland. Hales Chief Juſtice ſaid if the contingents fall in they will be difficult, but eſpecially on 17 Car. 2. Cap. which binds Ireland, being named and was in the life-time of William Hartpole the Anceſter. Sed adjornatur. (8) Ireland.

Penſacks *and* Fouks. *Trin.* 27 *Car.* II. Rot. 78.

IN Indebitatus pro premio of Policy of aſſurance, the Defendant demurred, becauſe an Action ſhould have been on the Policy: But by Wild Juſtice it may be there was no deed of Policy. Hales Chief Juſtice ſaid that debt lieth not for the premium of a Policy, no more than upon a Bill of Exchange; but it is Evidence whither there be a deed or not, and conſequently whither debt or Action upon the Caſe; and on demurrer the Court will intend debt will lie, becauſe it may as Indebitatus pro vinis, not ſaid venditis nor deliberatis, which was held good; and the truth was, the Wine was neither ſold nor delivered, and its ſufficient prima facie to ſatisfie the Court it was ſuch a contract on which debt will lie and not by Obligation; and it hath been ruled, that if it appears on Evidence not to create a debt, as for Wares ſold to a ſtranger, its ill being no debt: Alſo by Wild the Aſſuror hath ſo much mony to aſſure, and only ſubſcribes what is aſſured, viz. 100 l. &c. not the premium received, which remains by way of contract, and is never expreſt in (9) Merchants.

the Printed Polices; & per Curiam debt lieth thereon, being more certain than that de vinis or Indebitatus pro salario, &c. And Judgment for the Plaintiff, Nisi.

Richardson and Desborough. Ante.

(10) Legacy.

ON Libel for Legacy, the Defendant pleads payment of debts, and plene Administravit, which was refused because only one Witness, which by Raymond on Registre 58. A. is not sufficient cause of Prohibition. 1 Roll. Evans and King, because this way all Ecclesiastical Causes may be brought hither, 1 Roll. 302. pl. 3. and 2 Cr. 69. & 12 Co. 68. Hob. 247. pl. Hob. 188. pl. and Hill. 9 Car. 1. Yele and Sir Ed. Powell on refusal of Modus proved by one: 2 Roll. 299. B. l. 10. A Prohibition was denied, and no Judgment is in Yelverton 92. Levins contra, that on trial of incident plea contrary to Common-Law, Prohibition lieth as in Byrons Case, between Juxton and Pory, where Judgment was against the Act of Parliament incidently pleaded, and Prohibition granted; and here the Plaintiff in Spiritual-Court may Traverse the full Administration, or the refusal absque hoc, that it was because they had but one Witness; and the suggestion is not a general plene Administravit, but special payment to such and such, and if it be here found the Plaintiff in the Prohibition here hath not paid, the Defendant shall have a Consultation. Hales Chief Justice said a general Prohibition is not grantable; nor for that the Plaintiff here hath sufficient Evidence, but when particular proof is alledged and refused, Eo nomine, that there is but one Witness, a Prohibition lieth; no Prohibition lieth thus on Will, because the thing proved is of Ecclesiastical Conusance; but here the thing being in Issue being Temporal, they must be satisfied with such Evidence as is sufficient in a Temporal Cause, although this be an incident plea, and it will be unreasonable that Executors or Administrators should take about two Witnesses for every small payment; and so for Tithes; & per Curiam, a Prohibition granted, against the opinion of Twisden Justice.

Remsee

Remsee *and* Rutter.

DEbt on Bill to pay 50l. on demand, and on non-paiment the Defendant to pay 100, is brought for the 100l. The Defendant pleads there was no demand; to which the Plaintiff demurred, & per Curiam, the Action is a demand of the 50l. but no cause to forfeit the 100l. but the Defendant should plead: 2. Tender of the 50l. and uncore Prist, as on Condition to pay 4 Jac. on paiment pleaded, and Replication of non paiment, Rejoinder may be by tender, and uncore Prist; so on Bond on award to pay on demand being Collateral, its lost without demand, therefore no uncore Prist need be; but here its all but one deed; but where the Condition of an Obligation is to pay on demand, that is a distinct deed from the Bond, and there is no title to the forfeiture without demand; but the debt here of 50l. is not lost by not demanding; therefore in Bar the Defendant must say uncore Prist, 2 Cr. Dockry and Pannel. And Judgment for the Plaintiff. (11) Payment.

Hampton *and his Wife against* White.

ERror of Assault in Penwick in Cornwall on Son Assault pleaded, and general Verdict. Wine excepted, the declaration is before the appearance. 2. Plaint is the 1 of June, and Trespass the 24. of June, which per Curiam is ill, and not aided by generall Verdict; being not said Postea; but this was mistaken, and the other is aided by pleading, &c. (12) Days.

Warkhouse *and* Symons. Ante.

INdebitatus for Fees of Attorny against the Defendant as Executor, the Defendant pleads Judgment to A. B. and C. &c. all which are yet in force, ultra quod, he hath nothing to satisfie. The Plaintiff replies satisfaction to each particular, and concludes that all are kept on foot by fraud. The Defendant takes Issue by Rejoinder generally that all are good; to which the Plaintiff demurred: And Polyxphen for the Defendant, on 2 Cr. 625. Sam and Mercer, and 8 Co. 132. Turners Case, that the Replication is ill, and should conclude each Judgment kept on foot by fraud; and its sufficient for the Defendant to shew there is any Assets; and the reason of pleading several Judgments is to shield the Executor that (13) Executors.

that hath no Assets, and 1 Roll. 802. Croydon and Otway untill there be Assets found over and above what is pleaded, there can be no Judgment against the Executor; all other exceptions beside this are amended (Holt for the Plaintiff) on 9 Co. 108. Meriell Treshams Case, which is pleaded as here, and this is a general demurrer, and not special, because of the general conclusion in the Replication: Also if any Judgment be found its against the Executor, 1 Brownel. 49. And though the pleading of several Judgments doth not confess Assets to the value of all, yet it is a confession of Assets of more than one, why else were more Judgments than one pleaded; so pleading three Judgments is a confession of Assets above two Judgments, and so 1 Car. 25. Knight and Harvy, where the Verdict signified nothing on void Judgment, yet the Judgment is against the Executor as on express confession, and in 1 Roll. 802. there is only one Issue found, which should be both. Hales Chief Justice said the Replication was not formal, nor so many things ought not to be jumbled, as plea quod separalia placita are minus sufficient, which is now left off, but because as Jones 92. pl. 5. Gaytesteds Case, Issue cannot be on the composition which is an evidence, from which the Plaintiff may vary, and therefore he should have pleaded particularly to every one, that it was kept on foot by fraud; but as upon Nil debet he must say, nec aliquod inde Denarium, so in the Rejoinder, which the Court agreed both Replication and Rejoinder ill: But Twisden Justice excepted, that Indebitatus lieth not for soliciting Fees by an Attorny, which Hales Chief Justice agreed; and heretofore no countenance hath been given to soliciting, being of what expence they please, which makes the great excess of charges, and Solicitor that is no Attorny is maintenance. Et adjornatur.

Dominus Rex and Roberts, *&c. Wednesday,* January 26.

(14) Slander.

SYmson Excepted in Arrest to Indictment of a Riding in Canterbury, that the Defendants in derision of one Harding and his Wife, Cloathed themselves in Womens Cloaths, Vocat. Skimington, and did Riotously assemble to that purpose, contrary to the notice of the Constable and Justices to desist. 2. The Record of conviction on the view is Convincimus, but non allocatur, for Convincimus is all one with Convicti sunt: Also notwithstanding C. B. Hyde, &c.

were

were divided in opinion upon a Special Verdict of a Custom; tried before Twisden Justice; yet per Curiam, clearly this is a Riot, and not Justifiable: and he was fined 40 l. and three others 10 l. a piece, paid presently.

Richardson *and* Desborough. Ante.

(15) Prohibition.

HAles Chief Justice said that before 5 Car. 1. it was Pasch. 44. Eliz. B. R. Agard and Forth, Resolved on motion for Consultation (after Prohibition granted on debate) it was denied on proof of plene Administravit by one Witness, and in Pas. 48. pl. 40. Consultation was granted, but upon the same grounds that in temporal Acts, they allow the same proof that our Law requires, & per Curiam, Stet Prohibitio.

Pauly *and* Wiseman. Ante.

(16) Encumbent.

MAsters excepted against Prohibition upon appointment of the Curate with Salary, by Dr. Say Parson of Knockton, and he leaving the place unrepaired, his Executor is sued by the Plaintiff here appointed by Dr. Say by his deed, who sued for and received the Tithes in his own name on Linwood, Cap. Improbum that Edificia includes any beneficed; but per Curiam Linwood is no authority in this point, because he includes Farmers to repair who ought not, but they who may try who is Parson, may try who ought to repair. Et adjornatur.

Johnson *and* Parsons *against* Wicherly.
Thursday, January 27.

(17) Pardon.

EX motione Mr. Attorny Jones to have Special Verdict entred according to Notes and Rule of this Court, where the question was if the Defendant Parson of D. being turned out for treasonable words, upon 13 Car. 2. Cap. 1. §. 7. shall be restored, as ab Initio, being pardoned, and the Statute saying that in Case of pardon the party is to be as if he never had been Convicted; and whether this granted to the Defendant before the pardon be not as a fruit fallen.

Pigot

Pigot *and the Lord* Salisbury. Ante.

(17) Fines.

EJectment and Special Verdict at Bar that 1 Ap. 7 Jac. Mintern was seised jure uxoris of a reversion upon a lease to Colebank, that 1 Octob. Mint. & uxor covenant to levy a Fine to the use of the Wife for life, the Remainder to Sir Olive Leigh, and the Issue by the Daughter of Mintern, remainder to the Husband: and Fine levied by Mintern & uxor sur conceſſit to Hunton and Dackon for lives of Mintern & uxor; the tenant attorned, this Fine was in trust for the Lord Salisbury who entered before the 1. of Febr. 7. Jac. and the 1. Febr. Mintern and his Wife, and Lee Bargained and Sold to the Lord Salisbury with warranty, after which Mintern and his Wife levied a Fine sur Conusance de Droyt to the Lord Salisbury with warranty, which descended on the Son of Sir Olife; and Moity came to the Defendant, untill Dusted by the Son of Sir Olife. Levins for the Plaintiff made the only question upon the first Fine, which if it devested the Estate Tail to Francis Lee and his Wife, they are Barred by the warranty, if not the Entail is come to the lessor of the Plaintiff; this being a Fine sur conceſſit of a Reversion, is not within the Common rules of a Fine sur conceſſit, but a bare Grant. 1. From the words its an amicable Judgment, and taken as Coveiance, and subject to those rules, & tenementa prædicta, with Livery passeth only an Estate for life of the grantor; and the adding Quicquid habet pro term. vitæ & eorum diutius viventis is rather Restrictive, and the Render in such Fines is to give back; which is to restore what a man hath in him: so 2 Cr. 696. pl. 9. Eustace and Scowens Case cannot be for life of the lessees; and the tenendum pro term. vitæ & eorum diutius viventis shall not pass an Estate in Possession to Mintern and Wife in Possession: but cum acciderit to Bridget the Wife prsent, and to William Mintern if he survive the Estate Tail, and this must refer to the same Estates as the Premises, being in the same words. 2. Admitting the words doubtful, the Construction shall be for the rightful Estate; not to devest the Estate Tail and forfeit their own Estates for life; as Estate for life, not said whose is for life of Tenant for life only. 1 Inst. 42. a. & 182. a. & 7 H. 4. 32. a. Contra of such grant with Livery by Tenant in Fee, so 6 Ed. 3. 17. b. so 3 Cr. 338. so 8 Co. 154. Althams Case, Release of all demands, nec non totam dotem suam, in D. doth not pass the Dower in

Sale,

Sale, which might have been Barred by the Releale of all demands alone; so this totum & quicquid habet being precedent to the tenendum passeth only for life of the Tenant for life, and such construction must be made of the Fine as when levied, not ex post facto by purchase, or what hath happened since: Also this is but a Collateral warranty to destroy an Estate Tail by Tenant for life. 3. The intent of parties 12 H. 7. 6. is considerable in Fines, as Fine, Br. 28 & 47 Ed. 3. 14. Sower North and South and two Sons, William must be expounded by intent, and that here was to transfer the Estates for life legally, that no Entries might be upon the second Conusee; and otherwise all might have been done by one Fine, sur Conusance de droyt, and Mintern and his Wife lived untill 1646, which was Forty Years after, yet never entred, therefore the intent was only to pass what was legal. Finch for the Defendant, Its not now the question what the parties intended, but what is done; and by the words strictly this is an intire Estate in possession, both in the Premises and tenendum; for the Wives Estate for life will not warrant a grant for two lives, and the Law shall not make one intire freehold to pass by Fractions, though it be to prevent Discontinuance or Forfeiture; albeit 1 Co. Bredons Case, joining of Tenant for life with H. in Remainder, was held no forfeiture to preserve a Rent; but this hath not been strained for, 1 Cr. 405. it was held a Discontinuance, albeit both Estates were joined, but in our case there is an interposing Remainder in Tail, and there is no case where the Tenant for life joins with any that is not in immediate Remainder; that is not a devesting 1 Cr. 320. and Discontinuance, 1 Roll. 855. Garret and Blizard, Tenant for life in Remainder levies a Fine, albeit no discontinuance, nor doth displace the Estates in Remainder after him, because the Tenant for life in possession was alive, yet it was a forfeiture: and 6 Ed. 2. Estopple, an Averment may be against a Fine Come ceo, but not 15 Ed. 4. 28. against a Fine sur concessit, which supposeth no precedent Conveyance: Also these Estates might have been passed severally, and therefore Fine shall displace: And 2. the Lease for Years being as the possession, 1 Inst. 15. of the lessor, will not hinder the displacing, for the same Act in Tenant for life will make a displacing as in Tenant in Tail would make a discontinuance: and Dyer 363. & 1 Inst. 332. a Fine of a Reversion would be a discontinuance. Hales Chief Justice, the stress of the case is whither the Fine be a displacing, for if it be not, here is no Bar by the warranty or non-claim. Twisden Justice said, Quicquid habet was not intended to pass

quicquid habet in Estate, as of grant by Tenant in Tail of totum Statum: But by Hales and Wild the intent was not to displace, for if this had been a forfeiture, all the later Conveyances had been subject to the entry of the Remainder. 1 Cr. 320. Hales said he was Counsel where B. in Remainder for life, that had Remainder in fee after another Remainder levied a fine, Come Ceo, which was no displacing, yet was forfeiture; as Cesars Case, Fine of Advouson is a forfeiture, but no displacing; and the Fee-simple expectant in B. would not preserve it from forfeiture, because as 3 Co. Sir G. Browns Case, Fine carries all before it, but in the case in question the Wife hath for life present, and the Husband Remainder after, which is in truth an Estate to the Baron and Feme, and the survivor of them, though divided by the interposing Remainder, so their grant of quicquid habet will relate to grant such Estate as they had, not any new one, Jones 55. but better 2 Cr. pl. 9. Eustace and Scawen, laieth the stress upon the grant of totum and quicquid habet to operate only by way of Release: Also Fine by Tenant in Tail sur concessit, when executed is a discontinuance, as well as Fine Come ceo, but not on death of Tenant in Tail before execution, and this is not hindred by any Lease for Years; and here the Fine is executed by atturnment of the Tenant, and by entry of the Lord of Salisbury by command of the Conusees; so the stress of the case returns to the first Fine, whether it passeth both Estates for life Consolidate, or pass them severally, Rast. Entr. and part of Wests Precedents, the usual ways of Fines sur concessit was to grant tenementa prædicta, where there is no particular Estate; but when the Conusor hath but a particular Estate, then its also & totum and quicquid habet, as here 2. Rainsford Justice, said the warranty was determined by the death of Mintern and his Wife; but there is likewise a warranty general from Olive Lee and his Heirs, which will serve to Re-butt upon a Bargain and Sail, Olive being Collateral ancestor of Francis: Also had the Habendum been for the life of Olive Lee, the grant of totum and quicquid habet will not help it from a displacing, but here its for the life of Mintern and his Wife who had Estates for life: Also Francis Lee should have joined in the first Fine, but he was then an Infant. Et adjornatur.

Thrid-

Thridneedle *and* Lyneham. Ante.

ERror of Judgment in C. B. by North Chief Justice, on the death of Vaughan Chief Justice, for the Defendant there in Ejectment of the Manor of Tregayre on demise of Burnere and Tregayre, on surrender of all Services of Trigayre, excepting the demesns by the Bishop of Exeter, reserving 67 l. so much viz. 31 l. &c. for Burnere, and so much 35 l. &c. for Tregayre. Holt for the Plaintiff, that Lands anciently demised at an intire Rent, cannot be demised at Rent pro rata, which on 1 Eliz. Cap. 19. hath been a question according to the Letter, this is not the ancient Rent, and the Statute is stricti Juris and requires, as well the same means as the end prescribed; and on this reason 5 Co. Montjoyes Case, on 32 H. 8. Cap. where Lease by Tenant in Tail with ancient Rent, yet not pursuing all the means prescribed, its ill; and in Baily and Munns Case, on 14 Eliz. Cap. 11. Lease for 40 Years in Reversion was held void; and here is a mischief to the Successor in putting him to several remedies, that before were intire, debt or distress, and 3 Co. Walkers Case, before 18 Ed. 1. pag. de Quia Empt. Tenant could not make a Feoffment of part; and at this day the Tenant cannot assign part to apportion his own Rent; because hereby the minute parcels may swallow up the profits of the Rent that the Tenant in Tail may reserve. 1 Inst. 49. A Rent pro rata pursueth the words of 32 H. 8. Cap. but this Statute is to reserve the old Rent; and that Offices not mentioned are restrained, 1 Eliz. Cap. 19. this is for the necessary end of the Statute, but there is no equity to enlarge the Bishops Power, and the reason of 1 Anders. Fox and Collyer was, that it was not within the Letter of the Statute, and if part were drowned or recovered in Wast, the Bishop may Lease the rest pro rata, being by the Act of God or Law; but here being no necessity found, the Rent pro rata is void. 2. This demise as to Tregayre is void, which albeit a Rent might be pro rata, yet makes the whole demise void; and this is only a demise of Rents and Services, which as 2 Co. Jewells Case, are in Gross: All the demesns of that Manor being excepted in Lease, and its not sufficient that there are Copyholders, this is not sufficient for a constant remedy for the Successor, whence 5 Co. Elmers Case, Lease of Reversion is void, the Copyholds may be filed when the lessee of the Manor please, and are in paramount the reservation, and the Statute restraining part make it void for the whole, as on 23 H. 6. Cap. (18) Leases.

Obligation to appear and more, is void in all, 1 Cr. 47. Bishop of Chichester, and Freeland Old fee and New fee was void for both 2 Cr. 458. more largely 3 Bulstr 290. demise was held void, for the Land being so for the Trees before excepted, and yet the Rent issued not out of the Trees. Hales Chief Justice, said many Leases of Rents Coppholds and Services, as 22 Jac. Bishop of Gloceſter and Wood, and 5 Car. 1. Sheers and Porter have been held good, and grants of Coppold Mannors to one and Perquisits to another; and the Coppholds may be filed, yet this is not material: Also where a Lease is granted of part of Mannor for three lives on surender by lessee, so the Bishop could not renew the other Lease pro rata, unless the under lessee will surrender, for though the lessee will take security of the assignee, yet not the Bishop; and the same that made a question upon Tenant in Tail dividing, did it on this Statute, & per Curiam, this is a good Lease, and so resolved at Guildhall, the aim and end of the Statute being that the Bishops Rents should not be diminisht; and suppose a Lease of 20 acres warranted, and after on surrender of that the Bishop Leases 21 Acres at the ancient Rent, and pro rata as to the one Acre which will be at most void but for the Acre, unless all were at the same Rent, then the whole were void, as in the Bishop of Excesters Case 5 Jac. 1. where difference was between a Lease for Years of part in being; and Lease of Coppyhold in being, which doth not avoid Lease of the Mannor, &c. and as the Bishop may be prejudiced by a new Lease for 99 Years of all but an Acre reserved by Tenant for three Lives on assignment, having no remedy against the lessee for years; yet where fewer Acres are assigned, and the remedy left on the greater number of Acres, he hath more advantage, and if he may reseve pro rata when the Land is in his hands, he may do so when its not in his hands, and if the surrender be not good by the Tenant for life, the Bishop hath remedy upon it still, Adjornatur.

Cumberford *and* Birch. Ante.

(19) Powers.

Action upon the Case feigned for opinion of the Court upon intricate Conveyance, 20 Octob. 13 Car. 1. in 1637 where William C. Covenanted with Birch, to stand seised with power of Revocation, which gives notice of the uses of 16 Car. 1. between Ives and Rich. C. all the uses were

were revoked, excepted and limited to William for life, and the Heirs of his Body, and after to Dyer Birch and their Heirs in trust, that they and their Heirs by profit or sale pay debts that personal Estate will not amount to; and then that Lease be to John upon security not to disturb trust or uses; and in case none of the Brothers and Sisters of William C. or their Issue be alive, then from levying the sums, and after the Lease of 21 Years to the use of Robert C. for life, then for Francis Father of Thomas, who laieth the Wager that he hath an Estate in Law. Weston for the Defendant, 1. The greatest Estate in Thomas is a Trust in equity, and no Estate in Law, Dyer, &c. and their Heirs having the Estate, It cannot be limited over: But Hales Chief Justice, its all one whether this be trust or use as to the Plaintiff being reducible; but per Curiam its but a trust, and not a use in Dyer, &c. untill debts paid, &c. and then to go over to the Plaintiff. Pasch. 25 Car. 2 Carpenter and Gollins, Pargiter seised in fee Covenanted to levy Fine to the use of himself for life, and of part to his Wife for life; Remainder to his Son John, upon condition that if John died in the life of William to his Heir, and the Heirs of such Heir, Remainder to William in fee; the Court held this Remainder well limited over, because it might happen in the life of John; and 1 Cr. 529. and Jones 418. Rislies Case is the like, to A. in fee till debts paid, and after to B. was held a good Remainder, because the Portions were to be raised in the life time of the Trustees; but if the Portions were to be raised by the Trustees or their Heirs, the Remainder would be void. 2. Admitting the Conveiance design'd an Estate, yet none ariseth, the limitation being Repugnant, being to begin in Robert and John who were two Brothers, if none of his Brothers, &c. were alive, which is not only void as to Robert and John, but to Francis, &c. the daughters Issues, albeit in another Line, William C. died 1604, the Leases expired the 1. of June 26 Car. 2. and the debts are paid, and the Remainder falls after all, when there was Issue of Robert which hinders the Remainder to Francis or his Issue, for the words being intire and Negative are Negative as well to the Issue as to the Brothers, &c. Levins for the Plaintiff, the same Remainders were limited in the first deed as in the latter, so there was some Estate intended, and the whole shall not be construed to be void by the cross limitations; and this may be a contingent use to Trustees, unless such things happen, and after for benefit of Issues, as Boulton and Nichols Case, 1 Cr.

and especially because after the Trustees, its expresly

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to the use of the Brothers and their Issues, &c. which shall not be rendred ineffectal by the clause if none of the Brothers be living, but shall by the or be good, if Brothers or Issue be living after the Trusts executed; as Web and Herring 2 Cr. 415. But per Curiam, this was in a Will which would not be good in a Use, & per Curiam, the Plaintiff cannot have Judgment on this Declaration, because an impossible condition precedent suspends all farther Execution, & de facto, John one of the Brothers had Issue, so the contingent never hapened to the Plaintiffs that are Issue of the daughters. Hill. 7 Car. 1. Napper and Sanders Case, there may be a contingent in the same Conveyance as to part only, yet in this Case the si contingat the Brothers die without Issue, &c. hath influence over all the Estate, and it was not intended Francis the Issue of the Sister should be let in, untill after all the Issues of the Brothers be spent, and here being daughters of Robert one of the Brothers alive, no Estate can be executed to the Issue of the daughters; and though the Clause be Repugnant as to the Brothers, yet its not so as to their Issues; and unless they have no Issues, the daughters cannot take, nor their Issues; and being by way of Remainder and not of Contingent use, if they cannot take when the Remainder falls, they can never take: And Judgment for the Defendant, and there is no averment of security given.

Barnardiston *and* Soam.

(20) Error.

OFfly for the Plaintiff, that debt lieth pending Error on 22 H. 6. 38. being a new Original, which the Court agreed; and a Respondeas Ouster; and notwithstanding it was affirmed that Judgment in debt pending Error here was Reversed in Exchequer-Chamber.

Wakeman *and* Waker. Ante.

(21) Powers.

ON power to make Leases so as 5 s. be reserved for every Acre under Lease, where 5 s was not reserved, the Plaintiff claims. Hales Chief Justice said there was scarce any difference between Cumberfords Case, and this, but the question will be whether the intent be not that it was Acres must be demised, which differs from Cumberfords Case, and if the Rector where there is no Land may demise, then the

the Traverse is immaterial, and whether it be good or not, depends on the success of the Lease whether that be good or not. Et adjornatur.

Colledge of Phisitians and Cooper *or Hubert.*
Friday, January 28.

JOnes Attorny Gen. that 14 & 15 H. 8. Cap. 5. is well enough sent hither by the Mittimus out of Chancery; to which the Defendant pleaded that it wanted the Royal assent, and so nul tiel Record; 33 H. 8. Cap. 21. §. 1. & per Curiam, this exception goeth not only to all the Acts of this Session, but to all the Acts before H. 6. time, when Acts passed by Petition delivered by the Commons, received by the Lords, and answered by the King; upon which until 2 H. 4. Cap. & 9 H. 5. Cap. the Judges used to draw the Acts after the Parliament ended, after which in H. 6. time they came to a more regular way by Bills Soit Bail aux Seigniors, thence Soit Bail al Roy, and so le Roy le vult, and after by a Proclamation Writ, this was entred on the Roll, to this day called the Statute Roll without the Soit Bail aux Sein. or al Roy which is not necessary, for by this means all the Acts untill Ed. the fourths time would fail for want of a Bill. And Weston for the Defendant, on Lord Hunsdons Case, that the Royal assent ought to appear on private Act, being enrolled with all Private acts on Petition of the party, and the Royal assent is on the Statute Roll to every one of the Acts of this Session, beside 4 H. 7. 18. But by Hales Chief Justice, its not material the Royal assent should be in the Return, so the Return contained the Act it self; but if upon the body of the act it self, it appeared by the Commons and Lords without the King, &c. it were void, but from the beginning of the third of Ed. 1. untill H. 6. there is no mention of the Royal assent on the Statute Roll of publick or private Acts; and if the Bill it self were lost its not material, no more of the Royal assent Indorst, and having passed without contradiction, they are as much Acts as the Decree for Tythes in London, the Statute 11 Ed. 3. of the Dutchy of Cornwal. 2. The tenor of an Act certified from Chancery is sufficient on nul tiel Record, but not of a Record, whereupon execution can be had where its certified, but if it be where the Court, to which its certified cannot make any Execution, the Tenor is sufficient, as of Fines out of C. B. and from all inferior Courts to which this Court sends only a Tenor by exemplification (22) Parliament.

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fication which is always allowed to try any Issue, and the Tenor only is here filed from all inferior Courts; but the Patents being a Conveyance, an Exemplification was no sufficient Plea until, Ed. 6. Cap. on Co. Pages Case, but in 8 Co. 107. Dr. Bonhams Case, and 4 Inst. 251. its allowed as an Act, and if this exception were allowed it would strike off half the Statutes. The Certification of Chancery was of Tenor cujusdam Actus Parliament. tent. &c. missi. into Chancery heretofore, and not by Certiorari on this occasion made by Chancery to the Clerk of the Crown and Parliament, &c. but on Mittimus hence to Chancery is sent out of Pety Bag the Patent is recited de Dat. prædict. & Authoritate Parliamenti: Which by Hales Chief Justice is all that is in the Princes Case, 8 Co. 18. and the Prayer of the Act is that King, Lord and Commons do enact, &c. and reciting the presence of the King in the House of Lords, the Speaker and Commons present, all things being finisht debita autoritate, &c. and this Court cannot send to the Clerk of the Parliament, but only the Chancery; and if there be any defect on the Roll it must be amended in Chancery; but this Court must take it as certified from the Chancery; and though the Statute Roll be but a transcript of the Bill, it hath always been accepted as the Law, Jones 104. §. 5. and the Parliament Roll that hath the Bill, and the answer of the Lords or of the King, is but as the matter was delivered which is no warrant for a Statute now: And Judgment for the Plaintiff, for 100 l. per mensem 20 months. See Seldens Mare Clausum 249 & 250. Assent of the Lords and Commons is sufficiently implyed in the Royal assent only Annext.

Gregory *and* Withers.

(23) Ancient Demesn.

ON ancient Demesn pleaded, the Record of Doomsday Book was brought in, which was Abbas St. Petri tenet Alton T. R. E. (which is) in time of Edward was so many Hides, which per Curiam is only part of the survey, not of the Record of Doomsday, which is of Edward the Confessor himself, for its a Survey of all the Lands in England. 2. Though a Recovery in ancient Demesn be as good as at Common-Law, yet a Fine in ancient Demesn is but as a Feoffment, and no Bar of any entail, & per Curiam Judg. for the Defendant, that this is a Faller, &c. & per Curiam, where the later name varies from that in the Record, it must

must be averred precedent, that the latter name is known also by name in ancient time as in Doomsday, but its too late after shewing the Book to shoze it up by other Recozds, &c. Respondeas Ouster, &c.

Terry *and* Strodwick. Ante.

(24) Bar. and Fem.

Sarjeant Hards praied Judgment upon 3 Cr. 137. and Lud and Pennel, Pasch. 1649. in Trover by Baron and Feme on loss of their Goods, being good by Verdict, and Hill. 23 Car. 1. Slander against two after Verdict held good; and so in the case in question being Trespass of entring his Close and carrying away 20 Cart-load of Hay, not said Ipsius Querentis, which being only in damage is presumed after Verdict, the title not being in question. 1 Cr. 494. & 1 Leonard and Andrews 1 Ed. 3. 23. & 2 Ed. 3. 2. F. N. B. 87. & Hob. 283. Latch. 105. and Pasch. 1658. Syms and Child, Trespass of taking away 20 load of Wood, not said Ipsius Querentis, ruled good; but per Curiam, no Judgment was in the last Case; and as to Latch 105. the Charters did attract the Box, and so that is well enough without Sua, and Johnsons Case, turning up his ground with Plough, & Decem Charactat. of soil carrying away, ruled good. Masters for the Defendant on Yelverton 36. & 2 Cr. 46. & 2 Bulstr. 303. which were after Verdict, & per Curiam strongly for the Defendant, that nil Capiat per Billam be, Nisi.

Tilly *and* Collyer. *Saturday*, Jannary 29.

(25) Devise.

In Ejectment of Lands in Surry, as to Moety, Special Verdict find Raven seised in Fee held in Socage, had Issue by Susan Collier three daughters, and 1642 devised to Susan the Wife all my Freehold whereever, untill Susan my Heir come to 21, paying to the Heir 10 s. during the Term, and to the rest after 15 Years old 20 s. a piece; and the Heir to pay to Ann and Elizabeth daughters 100 l. a piece, 40 l. at the decease of the Wife, &c. and if Susan my heir dye without Heir before 21 that the lands discend and fall to Ann, then Ann to pay to Elizabeth, &c. Wats for the Plaintiff lesse of Ticer, Son of Elizabeth, that Susan the Heir takes nothing by this devise by Implication, there being no express devise

to Susan Stiles 301. pl. 657. Tayler and Web. Wallop for the Defendant, that Susan now is the sole Heir, and its all one to devise to Heir as to make a stranger Heir of his Land, and here the daughter Susan is not sole Heir, unless made so by the intent of the Will, which six times calls the Eldest daughter his Heir, and Alice the Younger would have equal share in the Land, and also the Legacies. 1 Inst. 236. 3 Cr. 146. Hales Chief Justice, the Testator was mistaken in his intent that the Eldest daughter was his Heir, but intends his Lands should go according to that mistake: Also she that is called Heir is to pay the Portions to the Younger, and no provision made for the Elder daughter. 2. There by Twisden can be no Estate Tail in Susan, because its not if she dye without Heirs, then to Ann or any else; so though Susan be dead without Issue, its not material; contra per Curiam, as Web and Herrings Case; This is an entail, were the devise positive to Susan, and if she dye without Heirs; but as Angells Case, this may be an Executory devise upon the payment and contingent of death, and the payment is to be paid by my Heir, which cannot be by all three that are Heirs at Law, because Ann and Elizabeth are Legatees; but is most consistent to be paid by Susan, who hath paied the Legacies and made a Feoffment, so its not material whether Tail or Executory devise. 2. Here is Feoffment by one Co-percener, which is a disseisin to the rest, and there being no entry found by the others, their Husband cannot be tenant by the Courtesie; contrary upon a Fine by one Co-percener, as 1 Inst. especially here the Eldest claiming all by the Will. And 3. albeit, here is no express devise to Susan, yet she being his Heir, this is sufficient to exclude the rest and to make her sole Heir. 4. This payment is a Condition, and its not found the money was not paied; and therefore the Court will not intend it; & per Curiam, there is no remedy for the Plaintiff, but by Formedon. Hales Chief Justice said devise to Youngest Son paying debts and Legacies to be Condition subsequent, must be found not paid; and so in Porter and Fries Case. Judgment for the Defendant, Nisi.

Dominus

Dominus Rex and Quino, *&c.*

LEek excepted to an Utlary on Error, that its quod 3 exact. non comparuit, and doth not say Nec eorum aliquis; but being for Recusancy, the Court conceived on 3 Jac. Cap. Sect. that they could not reverse it. (26) Utlary.

Plummer *and* Whitchcot.

DEbt against the Defendant for escape of Holt committed to the Marshalsea on Judgment; that the Defendant was seised and granted the Office of Warden of the Fleet to Duckingfield for three lives; who was seised of the Office and Messuage, and by Habeas Corpus Holt was removed, and by Chancery committed to the Fleet in Execution; that Duckingfield suffered the escape, the Defendant being Superior, and Duckingfield insufficient from the first time to the last escape; and special Verdict on Nil debet find the Declaration: and further that in C. B. there was a Rule of Court, That Satis constabat Curiæ, that Duckingfield was sufficient; but its found D. was insufficient, and that the Defendant had collateral security, and a Farm of 1000 per Annum. And by Saunders for the Plaintiff, that the Defendant is a Superior within the intent of the Law, on W. 2. Cap. 11. & 1 Rich. 2. Cap. 12. & 7 H. 4. Cap. 4. & 11 Ed. 2. Det. 172. the Commonalty of London, that have the Fee, shall answer for the Sheriffs: & 2 H. 6. Cap. 10. is a general Law in this Case, that all Officers by Patent, as this appears to be on Record, and 51 H. 3. pag. 11. Sect. 8. de Scaccario is the same as to the Kings debts: and 2 Inst. 312. and Dyer 278. pl. the Duke of Norfolk answered for Gawdy his Deputy within W. 2. Cap. 11. for debt, as well as in Account: and whether the Grant be for one life or more is not material: and calling the Officer Deputy, or Sub-Marshal, or any other Name that hath the Office in his own right, yet the Superior shall answer: and 39 H. 6. 32. b. pl. the Duke of Norfolk and Brandon: one cause of ousting Brandon for Escapes was, that the Duke had paid the condemnations; and it was never objected that this was more than needed be done by the Duke; and the County answered for a Coroner: and by these Cases it doth not appear that the party was insufficient when chosen, 2 Inst. 382, or 466. and yet the Superior answered; (27) Escape.

and 2 H. 6. Cap. 10. is, that the Superior put in such for whom they will answer, and its not sufficient; the Defendant did not know Duckingfield insufficient at the time; also in the former Cases it doth not appear the Superior was to have any benefit, yet they answered: and here the Defendant hath 1000 l. per Annum, & qui sentit commodum sentire debet & onus: and the Rule of C. B. is not available, for its a debt of Justice in the Court to examine the sufficiency; but this is done ex parte without hearing the Creditors, and therefore shall not conclude them, for the Court cannot try mens Estates, but its as an Inquest of Office.

2. Holt for the Defendant, That first at the Common Law the Reversioner shall not answer for an Escape, being but a personal wrong, for which not so much as the Executor or Administrator of the Goaler, are not chargeable at this day, Dyer 271. pl. 26. & 332. pl. 25. much less he in the Reversion. 2. The Defendant hath done no wrongful act, but hath done what by Law he may, 9 Co. 48. in leasing his Office. 3. When he hath made a grant he cannot controul the Grantee, nor prevent escapes, Trespass lying for his entry into the Prison to view: and the reason Hob. 12. why a Superior is answerable for a Deputy, is because the Deputation is revocable: and 39 H. 6. 32 is for a negligent escape; and either he must be liable for the granting the Office, which he cannot be if he had granted in Fee, or for the Reversion, and he cannot be chargeable for the Reversion, for that would as well charge his Heir. 4. Duckingfield came in by the act of the Court, and until admittance 11 Ed. 4. 1. he was not an Officer, and therefore unless he be in by the Court, they might as well take care of the Turn-key or Goaler; also the Goaler is not liable in respect of his Estate, but by reason of the possession, 2 Inst. 382. and upon the Statute W. 2 Cap. 11. extends not to this Case, the Commitment being to be to the Goaler, and he the Sheriffs Officer, its all one as if taken by the Sheriff himself. 2. There cannot be two Superiors: and 2 Inst. 382. is, that he that hath the Estate for life is a Superior, that is, Warden of the Fleet, and that is he that is in Possession, not the Reversioner. 3. None can be inferior, but he that is under the controul of the Superior, and this is the reason of Det. 172. The Sheriffs being removable by the City are inferiors. 4. The words are qui commisit, shall answer not qui concessit, 2 Inst. 466. declares this meant only of a Deputy, and the Case of a Coronor is in the Kings Case, in which 11 Co. the Earl of Devonshires Case, he that recommends a person shall answer

anſwer for him, and there is the allegation of Lacon, 39 H. 6. 32. that the Duke of Norfolk was at no prejudice by the eſcapes, the Deputy being anſwerable: and 2 R. 3. Rot. 8. B. R. grant of the Marſhal of England to Howard in Tail with the Marſhal of B. R. thereunto belonging, whereby it appears that the Marſhal is to the Duke but as a Deputy: and thus of any Deputy made by the Counteſs of Pembrock, the Sheriff of Northumberland, Noy 69. pl. 296. the Dean and Chapter of Pauls Caſe is in point: but by Hale Chief Juſtice that was ruled on the point, that it was not found the Baily was inſufficient: & non habet unde juſtificetur is to make amends, Paſch. 40. Eliz. in C. B. debt againſt the Dean and Chapter, for eſcape of the Baily of the Liberty, adjudged not to lie, becauſe not averred the Baily was inſufficient: and by the Common Law he that hath the Inheritance of an Office, and Farms it out by Licenſe of the Court, ſhall anſwer; ſo 2 Inſt. 340. on W. 2 Cap. 2. of Replevins: and Cap. 43. on uſurpation of Obedientiary reſpondeat Superior. 2. The Statute W. 2. Cap. 11. as to the point of eſcape extends to all Actions. Actions upon the Caſe lay before, but not debt, 16 Ed. 3. Damages 81. 18 Ed. 3. 35. Debt. F. 248. & 45 Ed. 3. 9. the conſequence whereof is that the reſpondeat Superior will be applicable in all theſe Caſes as well as in Account. 3. Its agreed 11 Ed. 4. 1. & 39 H. 6. 32. & Dyer 258. pl. that for a Deputy reſpondeat Superior, and there is the ſame reaſon of a leſſee, 13 Ed. 3. Bar. 253. & Mich. 37 Ed. 3. in Communia of the Exchequer, the Duke of Lancaſter having the Return of Writs and Goals, was anſwerable for the eſcape of Normanton Caſtellain of Lincoln, 12 Ed. 4. Rot. Parl. on Petition of the Duke of Norfolk for inſupportable damage by eſcapes permitted 10 Ed. 4. by Act of Reſumption of H. 6. he obtained that private Act for his Indemnity, which ſheweth he was chargeable: And quære 19 H. 7. Cap. 10. b. 15. between 10 Ed. 4. & 12 Ed. if any Action were brought for Eſcape, and whither Bouchier were Marſhal. And, 4. the Admiſſion by the Court is done but Ex Officio for the ſafety of the Subject, not to conclude him: and the Fleet is as well a Priſon to the Chancery and Eſchequer as to the C. B. therefore a Rule in C. B. cannot conclude all other Courts: And here the commitment is by the Chancery, and the Courts Admiſſion doth not make him ſufficient; and there is no difference between the Duke of Norfolk and this, he had power to make Leaſes, or Deputy; and when the Leaſe is purſuant to that power, the leſſees act ſhall not be a forfeiture of the ſuperior; but this is no reaſon

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why the Superior should not make recompence to the parties injured; for the giving power to Lease includes that the Grantee shall have benefits of forfeiture of his lessees; but if a Sheriff in fee could make the Sheriff for life, he should answer for him, else it were in the lessors power to prejudice the Subject.

Biggin *and* Bridg. Ante.

(28) Tyth.s. DEbt on Obligation, the Condition peaceably to enjoy from the 1. of February, usque Mich. Tithes, paying half Yearly during the Term, and on default of paiment the Defendant to be free from all Obligation to the Plaintiff. Replic. he assigned breach in non-paiment of Rent at Michaelmas; which by consequence is after the Term ended; and so the Defendant demurred, because the last day is no part of the demise, 3 Cr. 702. usque is exclusive of the last day: and on a Lease at Will, Yelverton 174. the Declaration in debt is on Entry from Michaelmas one Year usque, and upon & Post Mich. in another Year. 2. The substance of the Suit is quiet enjoyment, therefore ought not to be taken by protestation; sed per Curiam enjoyment need not be answered where its defeasanced by paiment of the Rent. 2. Usque in pleading is taken strictly, but 3. Leonard 211. pl. not so in Agreements and Contracts of parties: so for Ways from A. to B. the Indictment is exclusive of both; but ordinary Indictments is inclusive, but Co. Berwicks and Foster is against Co. Cluns Case, yet Judgment for the Defendant.

The Bishop and Mayor of Chichester. Ante.

(29) Poor. WInnington Solicitor opposed a Mandamus, on 22 H. 8.5. Sect.4. because by this means Justices would be but as a Cipher if bound to sign Tax that the Overseers and Parish Assess; sed per Curiam, albeit the Justices may for reasonable cause correct Tax, yet they cannot refuse to sign it without reasonable cause, notwithstanding 43 Eliz. Cap. 2. that saith they shall Tax, &c. the usage having been for the Parish to Tax, and the Justices cannot Correct it without cause; & per Curiam a Mandamus granted.

Thridneedle

Thredneedle *and* Lyneham. Ante, *Tuesday*, February 1.

(30) Leases.

HAles Chief Justice said here was the full Rent upon both Leases: and in Smith and Bowls Case, if the first Lease of part had been without any exception, and the later Lease had been with an exception, it had been good. 2. Albeit the Bishop cannot here distrain upon the Copihold, yet 5 Car. 1. the Bishop of Exeter, and in the Bishop of Gloucester and Wood, 21. Jac. a Lease of Copihold Mannor by the Bishop is good, notwithstanding he cannot distrain. And, 3. Were the apportionment in question upon 32 H. 8. Cap. 28 I. N. Bishops Leases having the same qualifications as the Tenant in Tail, may be as well apportioned, notwithstanding the disabling Statute of 1 Eliz. Cap. 19. for 32 H. 8. Cap. 28. lets not in a concurrent Lease by the Tenant in Tail, yet on 1 Eliz. Cap. 19. it hath been held good by the Bishop; which the Court agreed clearly, and would not now dispute whether a Bishops Lease for 99 Years determinable on three lives, were good or not; and Judgment affirmed.

Wakeman *and* Waker. Ante.

(31) Tythes.

HOlt for the Plaintiff. Lloyd seised in fee of the Mannor of Nonsuch and Rectory, settles with proviso to Lease all or any part of the Mannor and Premises, reserving 5 s. or more per Acre, of what is demised: and whether a Lease of Rectory alone be good, is the question, being found that Cuddington the Rectory consists only in Tithes, and its within the general words of the power; and the 5 s. per Acre is applicable only to such things as are let per Acres: so Hob. 170. Clauses explanatory shall not vitiate nor restrain the Premises; as if it had been, viz. to Lease the Mannor of A. and B. and left out the Rectory; also the power to Lease the Mannor and Premises would be ineffectual by such restraint. 2. The reservation is 5 s. per Acre of the Premises, not for the Premises, but as part thereof.

2. Wallop for the Defendant, that the Lease is not warrantable by the power to Lease all or any part of the Premises, not indefinitely, but such Premises as may yield a Rent of 5 s. per Acre: and this is the general intent of the Premises of this nature: the Premises in the reservation is only Arreable Premises, therefore the Premises in the power must

must be the same co-extensive and commensurate, otherwise it must be supposed a Rent may be reserved out of a Rent, Tithes or Advowson, wherefore all the Premises in the power must be intended of such as are Arcable. 2. The intent of such provisoes is, That some Rent or other should be reserved, though not confined as to the quantum; and here can be no Rent, because its of Tithes, and its not sufficient there be a reservation of Rent, unless it be an effectual Rent, which must be Arcable: And the other words that follow the reservation are not to enlarge the power, but to direct and guide the reservation. 3. If there were Glebe and Tithes to divide them, its no absurdity: no more of Houses, for they may pass Cum universalitate, &c. Also a House is admeasurable by Acres: and as to 2 Roll. Cumberfords Case, title, power, if no Rent were ever reserved before, such a Rent cannot be reserved now, such and the same implying a Rent, as on the Statute of 32 H. 8. that enables the Bishop, requires that the Rent be as within Eleven Years before; and the intent is much the same, and therefore should be conformed thereto: and Justice Barclay was of Opinion this Lease was void, and the Tithes were never enjoyed. Hale Chief Justice said, Cumberfords Case, as in the Decretal order in the Court of Wards was a proviso in Fine to William to Grant or Lease the Mannors, Messuages, Rents, Services and Premises, or any part thereof excepted, &c. so as the greatest Rent, as paid within two Years last, be reserved to him that had the immediate Reversion; and if there had been the words accustomably Let or letten within two Years, as in 32 H. 8. Cap. it would have avoided the Lease: and if there be no Rent before, its no restriction, albeit on 1 Eliz. Cap. 19. which is not to extend to Cases where the accustomable Rent is not reserved, which is no restriction, yet the reservation must be of such Lands as have been accustomably letten, as 5 Co. Mountjoys Case, which seems to bear against Cumberfords Case: The ancient Rent is an implied restriction, that it doth not extend to Tenements not anciently demised; but where a Rectory consists of Glebe and Tithes, the whole might be demised for 5 s. else they should be broken: so if the Tenement be of Three Acres, with Common sans number, as in Lincolnshire Ten times the value of the Tenement, the Common will pass by the Lease of the Tenement, as appertenant, yet 5 s. cannot be reserved for the whole, therefore this power is not restrainable, only to what is demisable by Acres to make demise of the rest void: and if the power had been to let the Mannor

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and Rectory, expressly reserving 5 s. per Acre, here the Lease is good of the Rectory without Rent; & per Curiam there is no difference between this and Cumberfords Case: and in 5 Co. Monjoys Case, the proviso was disabling that the Tenant intail should make no Lease but with ancient Rent; but in this Case the power is general, and enabling, and the later Clause restrictive: but hereafter its fit in conveyances to make such powers in Leases to be reserving the accustomed Rent, which had cured all: but here the power must be intended to let the Premises that consist of Acres 5 s. per Acre; but of what is not in Acres, no Rent need be reserved. And, 2. If of the Rectory it be good, though there be no Acres, the Rejoynner is good, that the Rectory is only of Tithes, without traverse absque hoc that the Rectory consisted of Acres; but this is idle and Nugatory, unless the Lease were not good without Acres, so the traverse depends on the point in Law; and Judgment for the Plaintiff, Nisi.

Phetyplace *and* ------

(32) Fines.

HAle Chief Justice said that the Conusee of a Fine Oct. Purificat. is a good Tenant to the Precipe of a recovery of the same day; and the Court will presume a privity the same day to support a conveyance; and trial sent into the Country upon this cause.

Norden *and* Levet. *Thursday*, February 3.

(33) Executors.

ON a Scire Facias against the Defendant, supposing a Devastavit; Special Verdict find the Administrator took a security for the Intestates debt in his own Name, but never received any Mony thereon; yet per Curiam this is sufficient to charge him de bonis propriis. Hale Chief Justice absent.

Syms *and* Sellwood. Ante.

(34) Religion.

MAsters excepted against a Prohibition to the Arches on Appeal from Presentment below, for not taking the Sacrament, because no Copy of the Presentment below was delivered in the Consistory Court; and after costs Award-

ed for not delivering Copy and Sentence, that the now Plaintiff should take the Sacrament; he prays now a Prohibition upon the same Gravamen of not delivery of Copy, & per Curiam, Copy ought to be delivered as well on Articles of presentment as on other Libels, by 2 H. 5. Cap. 3. and reading the Presentment to the party is not sufficient, and Prohibition quousque Copy delivered, &c.

Storke *and* Cullen.

(35) Obligation.

INdebt on obligation, Conditioned that J. S. shall abide the Judgment of the Admiralty, the Defendant pleads an Appeal to the Delegates, five Weeks after the Sentence that the Ship was Prise; to which the Plaintiff demurred. 1. Because this Appeal doth not excuse the paiment. 2. Because on 4 Inst. 339. the Commission ought to be under the Great Seal in Chancery; and not as here by the Constable of Dover, Lieutenant in the five Ports, 24 H. 8. Cap. 12. §. and 25 H. 8. Cap. 19. §. Appeals being taken from Rome, do devolve to the Crown, as in the Case of the Admiralty, 4. Inst. 141. an ancient Record of the Admirals Jurisdiction is forsque en Appeals. Serjeant Barwell for the Defendant, the Defendant is suerty for Blanker on Bailing of the Ship Arrested; and both bound, &c. which is discharged by the sentence on Appeal, and whether the Lord Warden of the Cinque Ports may receive Appeals, was the question: And on 4 Inst. 340. an Appeal doth lie and cannot be taken away; that the Lord-warden is an Admiral appears by 2 H. 5. Cap. 4. of safe conduct, & 27 H. 8. Cap. 45. and 28 H. 8. Cap. 15. settles the Jurisdiction of Lord warden within the Ports, as of the Lord High Admiral without, 5 Eliz. Cap. 1. and though the final and last Appeal be to the King, upon 8 Eliz. Cap. 5. of the Admiralty, which declares the usage, but gives no new Appeal, yet not immediately to the King in Chancery, nor was never any such Commission seen, but to the Admiralty. 2. By Register and F. N. B. 67. it appears the Lord-warden hath the same Jurisdiction as the King hath in a Homine Replegiando, and he may send a Habeas Corpus for any person imprisoned in the five Ports: Also as to safety of the person, F. N. B. 88. Register 80. Lamb. Just. 82. a special Supplicavit of the Peace lieth to the Lord-warden as a Judge without making Return: Also by the Writ of Error to him it appears complaints may be immediate to him 18 Ed. 1. Nu. 115. cited 4 Inst. 223. as well as to the

the Kings Court at the parties election, albeit the ultimate Appeal lieth hither: Also its averred in the Defendants plea the Appeal was to the Lord-warden, having due power and authority which is confest by the demurrer of the Plaintiff. 3. That the Lord-warden hath power to make Delegates is more properly a question in the Civil Law, which allows Princes and Magistrates of greatest quality as the Præfectus Prætorio to make Delegates when publick utility requires it; and the constant course in England is, that the King doth exercise his Jurisdiction by Delegates, and so do the Bishops by Commissaries. 4 Inst. 340. 2 Roll. 223. And the Lord-warden is always a man of Grandure and high-place. 4. That by the Appeal the first sentence is suspended, and by the Repeal made void: So 5 Co. Hales Case, Quare Impdit Fitzh. 143. and Gard and consequently all things depending thereon, as Recognizance of Bail where the Principal is Reverst; so upon void award the Bond is void, and in Chudeleyes Case an Aud. Quer. lay against the Administrator on repeal of Administration after Judgment had by him. Wild Justice said there is nothing of such power set forth in the Lord-warden, and this Court cannot take notice of it judicially, but being habens authoritatem its well enough; but though an appeal may be to the Lord-warden himself, yet the Lord-warden cannot make Delegacy by Commission, which the rest agreed. 2. An appeal will not suspend the paiment on this Bond, being to pay what Sir L. Jenking awards, by Wild; contra by Twisden and Raynsford; but if the Condition had been to pay sum certain, if awarded by the admiral, as 5 Co. Lamberts Case its good. Et adjornatur.

Kirkby *and* Dicer. Ante.

(36) Sheriffs.

DEbt on Sheriffs Bond, Condition to appear before his Majesties Justices in B. R. to which the Defendant demurs, as alia forma, because this appearance may be at the side-Bar; and an appearance Coram Domino Rege is not according to the Bond. Levins for the Plaintiff, that the Bond is not in Conceptis Verbis, in 23 H. 6. Cap. 10. but only to appear at the day and place in the Writ, and this in words are to be meant according to Common Parlance, as the first day of the Term may be the Quarto Die Post, & Comperuit Coram Domino Rege according to the Return of the Writ; and the question upon this Bond might come in question, and in Kirkbr. and Wilsons case a Bond was taken vice-

comiti, not said Comitatus Cumbriæ, which was held a good Bond a Year since, and 10 Co. 101. Beusages Case, its sufficient the Statute be persued by intent, and Dyer 364. pl. leaving out Camera Stellata was held well enough, and 2 Cr. 286. is this case in point; & per Curiam this appearance being to be in the same Court, and in the same Suit is well enough. And Judgment for the Plaintiff, Nisi.

Bradshaw *and* Andrews. Ante.

(37) Sheriffs.

ERror of Judgment in Ireland in action upon the Case on false Return, that the Plaintiff was in his custody, and Verdict for the Plaintiff; Sanders excepted that the Defendant below, Sheriff of Galloway, cannot have a Prisoner in custody in Dublin; but per Curiam, this may be on Habeas Corpus or by fresh suit, and being after Verdict that finds the false Return, the Court will presume him legally in custody; and Judgment affirmed.

Low *and* Hayward.

(38) Religion.

IN debt for costs on Conviction affirmed on appeal, and nil debet pleaded, Special Verdict found that security was given for the costs on the Conviction of the Conventicle; to which the Plaintiff demurred, because 22 & 23 Car. 2. Cap. 1. §. 7. albeit determined, yet this Conviction was during the time it was in force; and debt lieth notwithstanding the security. Sed adjornatur.

Dominus Rex and ------

(39) Alc.

AYers excepted to Indictment of Tipling, upon 4 Jac. Cap. 5. §. 4. because its not said that the Defendant was no Traveller, &c. as it should be upon 1 Jac. Cap. 9. to which this refers; & per Curiam it was quasht, and the Defendant need not plead he was so, this being not by way of exception, but by the body of the act.

Carter

Carter *and* Peckre. *Friday,* Feburary 4.

SYmson praied Prohibition for the Executor of William C. administrator, whose Predeceſſor Thomas Carter committed Dilapidations, the ſaid William having pleaded fully adminiſtred, notwithſtanding which ſentence was againſt William; after which the Plaintiff here was cited to perform that decree, and pleaded nulla bona of Thomas, notwithſtanding which they proceeded. Hales Chief Juſtice ſaid the Court cannot go back to the Sentence againſt William; but if the now Plaintiff hath Goods of Thomas's its reaſonable ſhe anſwer, but not for the Goods ſhe hath of William: The Executor of the adminiſtrator being not liable to Judgment againſt the adminiſtrator at Common-law, unleſs he hath Goods of the firſt Inteſtate; but there being no Affidavit of refuſal of the Plea, the Court only ordered to ſhew cauſe againſt Prohibition without ſtay in the mean time. (40) Church.

Palmer *and* Brown.

IN Treſpaſs the Defendant pleaded Son Aſſault demean; the Plaintiff replied by arreſt by Writ out of B. R. to which the Defendant rejoined that the Plaintiff broke open his Houſe before the arreſt; to which the Plaintiff demurred, becauſe this is a departure. Et Adjornatur. (41) Treſpaſs.

Smiths *Caſe*-----

JEoferyes praied a Prohibition, Elizabeth having two Brothers of the whole blood, and two Brothers and a Siſter of the half blood, and Elizabeth dying, one of the Brothers of the whole blood hath adminiſtred; and now a Siſter of the half blood Libels in the Prerogative, for a diſtribution, and on motion in C. B. for a Prohibition in that Court was denied; and it was urged that the Children of the half blood are not in equal degree or next of blood, within 22 & 23 Car. 2. Cap. 10. §. 3. Hales Chief Juſtice conceived the half blood in equal degree; but not next of Kin, 2 Roll. 303. for if a Remainder were Proximo de Sanguine, though the half blood take before the Uncle of the whole blood, yet he ſhall not take before the whole blood in the ſame degree: But the Act intended to provide for all the Children; and as to the Father (42) Adminiſtrators.

Father, the whole blood and the half blood are in equal degree, but not so as a Sister of the whole blood: and Prohibition, Nisi.

Hony *and* Daniel. Ante.

(43) Bar. and Feme.

DEbt against Baron and Feme Executor on Judgment, si tant. in manibus suis habent, & si non de bonis propriis as to damages, and in the latter Judgment on the Devastavit, its si tant. in manibus habent, not said testatoris & si non of damages, de bonis of the Husband, which is said to be ill as to the damages: And by Hales Chief Justice the wast being supposed by Baron and Feme, the action lieth not against Baron and Feme for the Costs, which attacheth only on the Husband, and cannot be joined with the charge of the principal debt against Baron and Feme which the Court agreed; and that the Feme Executor is not chargeable for wast by Baron and Feme, especially said to be after Judgment that was had against Baron and Feme: so it cannot be intended as Cr. Beaumond and Long, that the Feme wasted before coverture; but here though as to the debt the Judgment being against Baron and Feme, wast may be surmised against Baron and Feme, yet as to the Costs de bonis propriis, the Feme is not chargable, being not liable for them on the first Judgment, because it appears by the wasting she had no Goods: And Judgment for the Defendant, and left to Sc. F. with a Fi. Fa. to try it by Jury, and this will be no Bar to new action for less on the same suggestion, and the Court will never go farther; for debt lieth not against the Executor of an Executor for Devastavit, and the case in Exchequer was debt against A. Executor of B. Executor of C. the Defendant pleaded fully administred; the Plaintiff replied that B. did wast the Goods of the Testator, to the value of the debt; and Issue nul wast, and Verdict for the Plaintiff, that he did wast: and here on this Judgment being de bonis of B. Rule was given to Reverse it, for its a Tort that dieth with the person; and as a Contract it cannot be unless by matter of Record, for here the Defendant might wage his Law; and 37 Eliz. was denied for Law, 1 Cr. Beaumond and Long, it was agreed the Executors should not be charged by a surmise without matter of Record, because he could never know how to pay his debts, contra by Twisden Justice, but as to this agreed nil Capiat.

Duckingfield

Duckingfield *and* Wood.

(44) Sheriffs.

DEbt on obligation, condition for true Imprisonment of Maxie, and to pay all Fees and Chamber-rent, &c. the Defendant pleads the Statute of 23 H. 6. cap. 10. §. that it was for ease and favour; to which the Plaintiff replies that by proviso 23 H. 6. Cap. 10. §. the Warden of the Fleet was excepted, and doth not traverse the true imprisonment, to which the Defendant demurred; & per Curiam its ill, such obligation being void at the Common Law, and the Defendant need not plead the Statute, but by this also its void, as against Lenthal; where after pleading the Statute and Issue on ease and favour Judgment was against the Marshal, for the Statute is but supplemental of the Common Law, and the Marshal or other Goaler cannot impose what rents he pleaseth on his Chambers, albeit Maxie was in prison only on mean process, and on Latch Elworthies Case, Baylable at Common Law; and in Proctor and Hardings Case it was averred that such Bonds had been usually taken before by Predecessors, which Averment is avoided by the Goalers taking Warrant of Attorny for Judgment, to be true Prisoner; & nil capiat per Billam, per Curiam.

Hart *and* Philips.

(45) Assumpsit.

INdebitatus for money due upon sale of Lands by one Bullocke the Mother of the Plaintiff, to which the Defendant pleaded non assumpsit & Verdict for the Plaintiff. Sir William Pargiter excepted on Starkie and Mills, 1. Roll. and Stiles, that here is no consideration, there being no appointment of the Plaintiff to receive it nor other debt, and the verdict only intends debt in Bullocke, but not in the Plaintiff; and to this the Court inclined; but adjornatur to compound.

Dominus Rex and Parker.

(46) Information.

HAle Ch. J. notwithstanding 18 Eliz. Cap. 5. §. 5. knew good opinion that an Information for a transitory action, as here for a Riot, cannot be out of the proper County; and it hath been allowed in evidence to prove the cause of action was not in that County; and so Hale Ch. Just. and Wild said their opinion was clearly that what is criminal is local, albeit not upon any penal Statute, else upon an Information

mation here Evidence may be of Battery or assault, or perjury in Northumberland, which though it be allowable in an action for damages to the party, yet not as a crime; but by Twisden all is one, and unless Information may be in any County, the Stat. 31. Eliz. Cap. 5. §. 2. was to no purpose, and 21. Jac. Cap 4. §. 2. of swearing place is only in Actions Popular on Statutes, but the practice of all the Clerks is to bring all Informations only in the proper County; and Twisden agreed such a Rule were fit, but if they be brought they are not ill, but Curia contra. Ex motione Sanders to discharge Information in Lincoln against Commoners of Northamptonshire, the title depending on incertainty in which County it was, and the Court ordered stay of the Information & Trial to be in feign'd Assumsit on wager by consent in Middlesex.

Dominus Rex and Alderman. Ante.

(47) Coron. THE Court agreed Traverse may be to the Coroners Enquest of Felo de se; and in Exchequer it was pleaded that the deceast was non compos at the time, and issue thereon, agreed per Curiam to be good: And as to the objection that such can have no Executor nor Administrator that can traverse, is nothing, for until it be tried and found by verdict that he is Felo de se the Enquest is no estople no more than an Enquest thereof before Justices of Peace; but it was doubted on diversity of Presidents, whether two such Enquests without the word Murdravit be good, but party interest agreed to traverse, &c.

Hussy *and* Starre. *Hill.* 25. *&* 26 *Car.* 2. *Roll.* 1093.
Saturday, Febr. 5.

(48) Condition. A Special Verdict in Ejectment find lease for three hundred years by John Starre seised in fee, with proviso that if R. S. his Executor or Administrator, their Executors or Administrators, or any from them that shall be their Executors or Administrators, that assign above five years to any but the Sons of I. S. or to any but the issue of I. S. and R. S. to be void for so much as is assigned, and thence to William the Son of I. S. in fee after, which R. S. died, and James the Executor demised for 21. years to Grace S. who assigned to Burnet the Lessor of the Plaintiff the same day, and the Defendant claims as heir of I. S. and if this Assignment to Burnet be a breach, he being a stranger, or be void or not is the question; and for the Plaintiff it was said Grace was no Executor nor Administrator within the

the proviso, nor B. her assignee any from them. Dyer 45. Polyxphen for the Defendant that any other shall not be meant of any other Executors nor Administrators, but any other that shall come in under any Assignee of such Executors or Administrators, and this intent appears from the Deed which is for love and affection, and any other sense would be Tautology. 3. Cr. 331. Also this Assignment of Grace being the same day is Collusion 1 Inst. 223. and a breach of Condition, as Whetton and Mathews. Lease of Copyhold three years except a day, this was held fraud apparent without finding of the Jury, but per Curiam unless fraud be found, its not material, being not said ea intentione; and as to the first point this is a condition that shall be taken literally, especially being to make a perpetuity, which is odious of a Term, therefore an assignment in trust for A. and his heirs males, Remainder over in Chancery is given to the first cesty-que use; and of a Devise to the issue of R. Remainder to their issue, goeth to the first Devisee; so of a Condition not to alien, but to Wife or Child, or that he or his Assignees shall not alien, but to Wife or Child of the Donor doth not restrain the Child to alien to any, and the alienation in this Case being out of the words of the Proviso is no breach, as 4. Co. 119. Dumpar's Case: And though the first words Executors or Administrators run to all, yet when its confined after the Court, will not enlarge it, and Judgment for the Plaintiff, Nisi.

Lee *and* Piggisly. *Trin.* 27. Car. II. *Rot.* 1227.

ERror of Judgment in Barstable in Debt on Obligation to perform Articles; the Defendant pleads performance; the Plaintiff alledgeth non-payment to I. S. secundum formã Artic' the Defendant in his Rejoynder demurs, because the payment is not alledged to be any Article contained in the Indenture, nor setting forth the Indenture; but per Curiam the Bar below by performance not setting forth the Indenture is ill, and the Court held the general replication well enough without setting forth the Indenture, being intendable, not appearing but that it may be an Article; also the Defendant below in Rejoynders might have taken Issue there was no such Article, and then the Plaintiff on Demurer could have had no Judgment, but having by alledging breach waved the ill Bar that did not set forth the Indenture, and Judgment being for the Plaintiff below, it was affirm'd per Curiam. (49) Deeds.

Hipsley *and* Tucke. *Trin.* or *Mich.* 27. Car. II. *Rot.* 620.

(50) Error.

ERror of Judgment in slander out of Marlbrough was assigned in fact, that the Mayor had not taken the Sacrament, and therefore on 25 Car. II. Cap. 2. §. 4 the Judgment being above three months after his being Mayor, without any new Election was Error; to which in nullo est errat. is pleaded, and 3. Cr. 320. he is not estopt to allegg this. Polyxphen for the Defendant, that Mayor in fact is sufficient, as 2. Cr. and 3. Cr. a Commissary or a Steward in facto is sufficient; and by Hale Ch. J. there must be a Conviction before this can be made a nullity, being admitted to be once a Good Mayor de Jure; and in Simmons Case upon not reading the Articles on 13 Eliz. Cap. 12. Sect. 2. the Parson was put to prove the reading the Articles; and on 14 Car. 2. cap. 4. Sect. 10. of Uniformity, a Parson must prove assent and consent as to the parties own interest, Sect. 9. 31 Eliz. 6. of Simony, & Da. 46. the Dean and Chapter of Ferns Case; this is void as an undue Election, but as to the Interests of a stranger as acts of Jurisdiction they are not void, as Judgments here in Westminster would not be void by any one, or all not having duly taken the Oaths; these matters are Collateral, and therefore not void, which the Court agreed, præter Twisden, who held this Disability assignable for Error to be void, see Inst. 81. in 9 H. 3. cap. 1, &c. & Adjorn. Tr. Error. Br. 141.

Welby *and* Harbert.

(15) Custom.

ON Custom to find Cakes and Ale for the Parson and Church-wardens on perambulation of 8 shillings on 2. Roll. 287. Mor. 916. it was said that this was no good custom, and therefore a Prohibition ought to go, being to charge a Freehold of a Farm in Longton. Holt for the Defendant, that this is a good custom, and the Suit proper in the Ecclesiastical Court by the Church-wardens. Jones 230. & 1. Roll. 420. & 1. Inst. 162. being no Corporation to take in succession; and the Court inclined strongly this was a good custom, as to cut Bull-rushes in lands of I. S. to strow the Church. But Adjorn. on Demurrer to Prohibition.

Ilder

Ilder *and* Hancocks. Monday, *Febr.* 7.

EX motione Serjeant Pemberton to set aside Execution against Bayl by the bye, being not for cause returned on Habeas Corpus, the Court agreed that on Habeas Corpus Bayl by the bye is only an appearance between the same parties for all causes not return'd, but on a Cepi Corpus the Bayl is chargeable as Bayl for all Declarations between the same parties but only an appearance for others; & per Curiam restitution awarded. (52) Bail.

Dominus Rex and Tayler. *post 621.*

AN Information by Mr. Attorny Jones for saying, Christ is a Whoremaster, and Religion is a Cheat, and profession a Cloak, and all Cheats, all are mine, and I am a Kings Son, and fear neither God, Devil, nor man: I am Christs younger Brother, (proved by three Witnesses) and that Christ is a Bastard, and damn all Gods of the Quakers, &c. In destruction of Society and Religion, and contempt, &c. None fears God but an hypocrite, proved by one. Hale Ch. J. these words though of Ecclesiastical cognisance, yet that Religion is a cheat, tends to dissolution of all Government, and therefore punishable here, and so of contumelious reproaches of God, or the Religion established; which the Court agreed and adjudged. An Indictment lay for saying the Protestant Religion was a fiction for taking away Religion, all obligation to Government by Oaths, &c. ceaseth, and Christian Religion is a part of the Law it self, therefore injuries to God are as punishable as to the King, or any common person. Verdict. pro Rege. (53) Blasphemy

Warkehouse *and* Simmons. Ante.

THis was no Indebitatus, but a Quantum meruit as to Fees here, and therefore its well enough, and Judgment affirmed. (54) Fees.

Joyner *and* Watts.

DEbt as Administrator during Minority of four Joyners on Lease of Chr. Joyner, and that Rent was arrear to him after death of Intestate, not shewing any title; also three are said to be under seventeen years old, and that the fourth was eighteen; and the Defendant demurred to the Declaration, (55) Rent.

on, it not being said what estate the Lessor had, which per Curiam is ill, for if Intestate had fee, the Rent goeth to the heir, and not to the Executor; and if Intestate were but a Termer it must be shewed, and the averment, that one is 18. determines the Administraion, and the Plaintiff amended.

Jevan *and* Cotton.

(56) Days.

IN Assumpsit for 1500 l. Marriage Portion, the Defendant pleads non Assumpsit infra sex annos; the Plaintiff replies by an alias Capias, the first being Returnable out of Term, and so no Latitat appears, and that the Assumpsit was within six years, to which the Defendant demurs, specially because no Latitat or original process was set forth; & per Curiam, it may be the Latitat was first sued before the promise, or above six years before the alias, and it was a great step to give favour to enter Continuances; & per Curiam Judgment for the Defendant, for albeit an erroneous process, as if Returnable out of Term, or on Sunday might be a question upon 21 Jac. Cap. 16. of Limitations, yet here is no Latitat at all, and if it were erroneous Return, it were void.

English *and* Hart.

(57) Arbitrement.

DEbt on obligation, in Sept. condition to perform award, on no award pleaded the award is set forth, and breach and demurrer thereon being to be performed 23. Oct. the award is made 23. Oct. to pay 60 l. in Decemb. and after, and upon payment the Plaintiff and Defendant to release all demands to the date thereof. Serjeant Maynard excepted that this is an award but ex parte, the release being not to be done until payment, Sed non allocatur, all being to be done at once, and Judgment for the Plaintiff, albeit the Bond be extinct.

Davis *and* Hood.

(58) Rents.

TRespass, the Defendant justifies by mean Conveyances of a Rent-charge, to which the Plaintiff demurred, because no commencement of the Rent is shewed, which the Court agreed in case it had been a Rent-charge, but this being a fee-farm Rent, the Stat. 22. & 23. Car. 2. Cap. 24. §. 8. provides that it shall be sufficient to shew a Conveyance from the Trustees seised, &c. and 2. the Distress is detained part for reasonable charges, which is well enough on that Act and Judgment for the Plaintiff.

Dominus

Dominus Rex againſt Fern *and* Ricard, *&c.* Ante.
Tueſday, Febr. 8.

EX motione Crofts, Judgment was entred on Conviction againſt one before the iſſue upon a cheat of one Mrs. Seymor, was tried as to the other, notwithſtanding 2 Roll. 722. §. 19. Sheffields Caſe, but on Iſſue tried as to one no Venire Facias can go againſt the other until Judgment againſt the firſt. (95) Joynder.

Welby *and* Harbert. Ante.

SAunders excepted that this Preſcription by a Pariſh for a profit apprender is void, and the value certain or not is not material, though ratione tenuræ, a man may be bound to ſuch a charge, yet not by bare Preſcription, for here none can releaſe this charge, neither Parſon nor Churchwardens; and this is not like an Eaſement of reſting at ſuch a houſe, or pulling up a Hedg, which the Court agreed, this being but originally a kindneſs; as the Lord Carliles Veniſon Paſty to the Judges in Circuit, and Lord Bedfords Wine and Cakes, this would deſtroy all civility to bring it in as a Cuſtom, and this is a Preſcription for an Intereſt as much as for a Corody; and Judgment for the Plaintiff in the Prohibition. (60) Preſcription.

Ree *and* Barns. Ante.

DEbt as Adminiſtrator on obligation to perform Covenants in Indenture of Charter-party alledging Adminiſtrationem commit debito modo, not ſaid ubi, & profert literas adminiſtratorias, to which the Defendant demurred, becauſe no place appears where Adminiſtration was committed, which is traverſable; and though Adminiſtration be by D. and Chapter of Durham ſede vacante, & ſo intended in Chapter-houſe, yet no Viſne can be from a houſe; but Hale Ch. Juſt. conceived this ayded by ſhewing the Letters of Adminiſtration; but Curia contra, and Judgment for the Defendant, Niſi; but all agreed that on deriving Adminiſtration down by aſſignments the place of Adminiſtration muſt be ſhewed, as Trudgeons Caſe; but by Hale Ch. Juſt. its ſufficient to ſhew the place of Adminiſtration in replication when its denied as Adminiſtration Commit per Dominum Regem, without place, is good, the Letters being the chief evidence of the Adminiſtration, Niſi the Plaintiff conſent to reference. (61) Adminiſtrators.

Dominus

Dominus Rex and Felton, *&c.* Ante.

(62) Religion. SErjeant Barwell excepted against Conformity, being an Information for not coming to Church upon 23 Eliz. Cap. 1. §. 5. preferred by Sir Thomas Fanshaw, but per Curiam its well allowable being no common Informer; and although there were no Bishop of London at the time, yet submission to Dr. Stillingfleet after approved by the Bishop, is sufficient, and this prosecution being by an Inn-keeper, the Court said that if an Inn-keeper sells Ale to any but travelling Guests, its as to others but an Ale-house. 3. That on 4 Leonard. 54. & Co. Entr. 569. 2. Bulst. 324. Conformity, may be any time before Judgment, but not after, and may be in this Court well enough, the Stat. 23. Eliz. 1. §. 10. N. 1. being not exclusive, and taking the Oaths; Judgment for the Defendant as to 3.

Lomax *and* Boyl.

(63) Assumpsit. QUantum meruit for Wares sold, alledging notice of the value not said ubi, to which the Defendant demurred; & per Curiam, the notice is not traversable, for he that buyeth must know the value, and may tender so much as he thinks it is, and to go on for the rest, and Judgment for the Plaintiff in two Causes.

The Bishop of Carlisle *and* Wells.

(64) Ordinary. DEbt on obligation to the Bishop and Commissary on the appointing tutilage of an Infant, natural Daughter of Warkhouse, well and truly to bring up and educate, and to defend the body and goods, to pay Inventory in three months after age or marriage, or on death to Executors, &c. and make true account, and not only acquit but enter further security to the Ordinary as required at all times hereafter. Defendant on Oyer pleads the Bond was taken corruptly & extorsive for Urwin to have Guardship of Lightfoot the Infant, to which the Pl. demurred, and by Weston for the Pl. 1. the Ordinary may take Bonds of Curatorship, being appointed by Common Law Tutors of Minors as to Personal Estate; which they may assign over on security. Swinborn 102. & 106. this is the common practice of the Civil Law, and 2. Roll. 305. such Bonds have been admitted, and 3 Cr. 685. the Admiral is allowed to take Bond to make good their own Awards, and

if

if the authority be not well pursued, the Bond is at Common-law, and then if any one thing be lawful its good: for that Sir Daniel Nortons Case, Hob. 12. Also though Obligatio stare mandatis Ecclesiæ must be in the name of the King, as the Bishop of Excester and Starre, yet here the Ordinary is but as a Trustee for the Infant. Holt for the Defendant, that Bonds to obey sentence, and for distribution have been held void before the Statute; & per Curiam, the Ordinary may appoint a Curator for the personal Estate, but cannot make Guardian for the Body or Land, nor is a Bond good to an Ordinary and Commissary; and the condition to maintain and keep and enter new Security is utterly void, and where Obligation is taken for part in, and part not within Jurisdiction, the Bond is void, at least as to what is out; and though the Ordinary be trusted, yet not the Commissary, no more than to a Proctor or a Surrogate; and all Bonds are now in the Arches taken to Archbishops, else the Commissary surviving would have a new Office. And Judgment for the Defendant.

Pollard *and* Robins.

(65) ACtion upon the Case for entring Judgment without Warrant in Inferior Court of The Defendant pleads he is an Attorny of C. B. and that by Custom such may prosecute Super, for Coram Judicibus of Inferior Courts, and so concludes in abatement, & per Curiam a Respondeas Ouster.

Kirkbright *and* Curwin.

(66) THE Court conceived the Bond well enough, albeit the stile of the Court be Coram Domino Rege, and on nul tiel Record of appearance, the Record must be Coram Domino Rege, for these may be so entred on the Record here, but the Statute was to avoid extortion and is not void by such a Return. Hales Chief Justice doubted, but its best Stare Decisis. And Judgment for the Plaintiff. Obligation.

Harley *and* Gibbons.

(67) ERror of Judgment in Shrewsebury, in consideration one Horshall Bailiff of the Plaintiff would discount to the Defendant 3 l. the Defendant owed so much for a Barge of his Masters, the Defendant promised; to which the Defendant Assumpsit.

dant demurred, this being an unlawful consideration; and the promise to a third person, viz. the Plaintiffs Bailiff, which doth not discharge the debt, which the Court agreed; and Judgment Reverst.

Masters *and* Wood. Ante *Mich.* 27 *Car.* II. Rot. 556.

(68) Trespass. BAttery in Somersetshire, justified by Process in Dorsetshire, and tryed in Somersetshire: & per Gold, This is within the words of 16 & 17 Car. 2. Cap. 8. §. there being three Jugments in this point: Tr. 26 Car. 2. Wise and Adderly in C. B. Croft and Winter, and Croft and Bays case the Court declared they were not satisfied with these Judgments: but the Defendant traversed absque hoc, that he was guilty, aliter vel alio modo; the Replication was that he was guilty aliter & alio modo, which per Curiam is a wild Issue, and Repleader awarded per Curiam, and thereby this exception may be set right.

Low *and* Haywood. Ante.

(69) Religion. DEbt on Judgment, on 22 Car. 2. Cap. 1. §. 7. for Costs on affirmance of Judgment in Appeal, Special Verdict find that before the Appeal a Recognizance was entred to pay the Costs at the Sessions, & per Curiam the Recognisance is no Bar to the Action for the Costs. 2. Though the Cause be to be finally determined at Sessions, yet when the cause is there determined, debt for the costs lieth here well enough, as on Recognizance here on Error in Exchequer-Chamber if Judgment be affirmed; yet debt lieth for the costs on the Recognizance, as well as here upon the Judgment: And Judgment for the Plaintiff, Nisi. 3. Albeit there be division of shares, yet the Prosecutor being put to the charge and trouble of appeal, shall have the whole Costs, so in actions Tam quam the Court often makes the division.

Nichols *and* Nichols.

(70) Condition. DEbt on Obligation, condition to pay a stranger at three paiments; the Defendant on Oyer pleads paiment according to condition of another Obligation to the stranger; to which the Plaintiff demurred, because its not not said what the

the particular days of paiment were, nor on what days it was paied; which per Curiam is ill, unless the other Bond to the stranger were set forth. And Judgment for the Plaintiff.

Yates *and* Forth. *Wednesday*, February 9.

(71) Days. SPecial action upon the Case against the Plaintiff in the Kings name, for the benefit of the Duke of York, on agreement with the Defendant to have debts; and that the Defendant should procure discharge of Judgment at the suit of the D. of York, averring assignment of debt out of Brewhouse at Kingston, The Defendant pleads Actio Accrevit before the Statute of Limitations, the Plaintiff replieth he hath been ever since 1667 in Prison in Execution upon that Judgment, & per Curiam, whether this be well replied or not, yet here being a continued wrong, the Defendant shall not take advantage of it. Hales Chief Justice said that here are several causes of damage; and as to what was before the Statute of Limitation its well enough: But 2. the Statute being pleaded as to the whole, its ill, for all going not to the whole; but its just on the Writ of Enquiry to sever damges. 3. The Plaintiff should have replied quod actio accrevit Infra sex Annos, that so Issue may be thereon. Et adjornatur.

Irish *and* Hillar.

(72) Execution. ON Scire Facias after the Year after Judgment in C. B. Returned nihil, & non est Inventus in Hartford, after which an alias Capias ad satisfac. is made out into another County, which was assigned for Error here, there being no Original Capias ad satisfaciendum in the proper County; but per Curiam this is well enough, there being a non est Inventus Returned upon the Scire Facias, its all one as if an Original Capias ad satisfac. had issued: and Judgment affirmed.

Bastard *and* Stuckely. Ante.

(73) Legacy. PRohibition reciting Magna Chart. Cap. 18. and that the Plaintiff had four Children and a Wife, and that two of the Children were Executors and devisees; one of which died, and the other Married the Defendant; and the legacy being vested in the Wife as survivor, Tenant in Common, the suit cannot be in the Spiritual Court for an interest setled but at the Common-law: also here they cannot be Tenants in Common because its not averred the debts were all paid; but they are only Joynt Tenants, and so if the Spiritual Court do not al-

low a survivorship as they never do, this is ground of a Prohibition, so quacunque via data, the administrator of the deceased cannot sue in Spiritual Court, as where a House is devised to B. and the Executor assents, the Legatee cannot sue in the Spiritual Court; and though he hath no remedy at the Common-law, that is no reason to sue in the Spiritual Court, and on 2 Roll. 301. per Curiam Stet Prohibitio, Nisi, without averring debts paied.

Pawly *and* Wiseman. Ante.

(74) Tythes. PRohibition in suit against Executor of Curat who is appointed to receive Tyths, and hath a stipend for Dilapidations of Orpington, whereof Dr. Say is the Vicar, and per Curiam, a Curat being but at will, is not lyable to Dilapidations, being not instituted nor inducted, and this appearing on the Libel, this Court ought to prohibite on 13 Eliz. cap. 10. an appointment by Licence of Archbishop being but as a Lessee at will is no Encumbent, &c. Notwithstanding Twisden held no Prohibition ought to be before Spiritual Court's Judgment that Curat is liable; yet Prohibition awarded per Curiam.

Kirkbright *and* Curwin. Ante.

(75) Sheriffs. HAle Chief Justice caused the Roll to be brought into Court and read, which was between Brecland and Laws, Mich. 1649. Rot. 26. Stiles 212. Pl. 482. to appear in Cancellaria apud Westm. on an attachment of contempt to appear coram nobis in Cancellaria ubicunq; fuerimus, to answer contempts in Debt on the Obligation, and the Statute 23 H. 6. cap. 10. plead it was adjudged void, and that Attachment was as well within the Statute as a Process between common persons. 2. Resolved that ubicunque, &c. were essential words, and part of the stile of the Court. and no accidental variation, but omission of it voided the Bond; and the Return saying ad respond' de quibusdam contempt in Cancellaria ubicunque, was not sufficient, and adjudged that Plaintiff nil capiat per Billam, but not entred, and soon before or after this adjudged that Process to appear coram Domino Rege apud Westm. was good if the Court were here then de facto, but upon a Sheriffs Bond its otherwise, but the rest held it well enough here on 2 Cr. 286. but adjornatur, to know the course; and Hale Chief Justice said special Bail came into height by inferiour

inferiour Courts, who because they could not take men out, would secure them in, and thence they prayd on removal of Cause not to be in worse Case here than below, and adjornatur to search the course in Northumberland.

Norden *and* Levet. Ante. Hill. 26 & 27 *Car.* II. Rot. 984.

SPecial Verdict find one H. possest of the Testators Goods, and after the Defendant the Executor had part of satisfaction, and for the rest he was sued by the Defendant and imprisoned, and after on covenant to pay in satisfaction, the Defendant Executor discharged him, and the Mony being not received, the question was if this were a Devastavit in the Executor, who on refusal to prove the Will took out administration; and here no discharge given by the administrator to Hope in a Scire facias on extent on Statute, and Devastavit Returned, &c. & per Curiam, discharge of duty is all one as if received; but taking this increase of security is no Devastavit, though taken in his own name, neither could the taking one Bond discharge another, but taking a greater Security will discharge a lesser, and a covenant to save harmless of Goods wasted without actual receit of Money or value is no Devastavit, nor is this any contract with the Executor for the Goods that were sold by Hope before this Covenant. Hales Chief Justice said the only difficulty is, that in debt against Hope as Executor, de Son Tort, he will plead fully administred, and if he be not chargeable because of transferring the interest to the Executor of Right, then the Executor of Right is: if Hope be liable, yet the Executor will be discharged, and have no remedy against Hope, but this is his own folly, having given Covenant to save harmless. Et adjornatur. (76) Executors.

Davis *and* King. *Mich.* 27 *Car.* II. Rot. 673.

DEbt against Executor on Devastavit, the Defendant pleads that he hath not wasted the Goods, not saying nor any part thereof; to which the Plaintiff demurred, because if any part be wasted, the Defendant is chargeable for so much; the Court agreed on nil debet, this would come in question, and it may be as well here on Evidence, abeit if (77) Executors.

Verdict find only part waſted, it may be conſiderable what Judgment the Court ſhall give, but the plea non Devaſtavit modo & forma is as good as no waſt done without ſaying nec aliquid inde parcel', for the Jury may find only as to part; and then the queſtion will be what Judgment to give, ſo in Error to Reverſe Fine of 40 Acres, the Defendant pleaded Feoffment of the 40 Acres, and on non feoffavit it was found a Feoffment was of 20, and for theſe Judgment was given, and againſt the Plaintiff for the reſt; and it may be ſo here, the point of the Action being now the Devaſtavit, and not like a Plene adminiſtravit which is and of every parcel, which the Court agreed, but ordered to wave the demurrer and take Iſſue.

Andrews *and* Spicer.

(78) Bankrupt.

IN debt on Obligation, the Defendant pleaded that before the action brought the Plaintiff became a Bankrupt; to which the Plaintiff demurred, & per Curiam, its an ill plea; and untill an aſſignment be made the debtor is defenſeleſs: And therefore Hanſon and Hale payment before Commiſſion ſued out is good enough, and ſo it is before his debt be aſſigned. And Judgment for the Plaintiff.

Odingley *and* England.

(79) Condition.

IN debt on Obligation conditioned to perform Covenants, Paiments and agreement in Indenture of Demiſe of, Lands in poſſeſſion of A. for Years, the Defendant on Oyer pleads performance of all Covenants, Paiments and Agreements; and ſo the Bond is void by the Covenant; to which the Plaintiff replied that the Defendant had nothing in the Lands, but one A. to which the Defendant demurred, & per Curiam, this is a Good breach, notwithſtanding no actual eviction of the poſſeſſion is ſet forth. 2. The pleading performance of all paiments being only in purſuance of the Covenant, and pleaded as a defeſance to the Obligation, doth not make the Bond void, nor can the Plaintiff take Iſſue on paiment, unleſs ſo ſpecially pleaded. And Judgment for the Plaintiff.

George

Countess of Portland *and* Andrews.

IN debt for Rent the Defendant pleads that the Lands are Copyhold; and that before the Rent arrear the Lord entred, and that the House alone was not sufficient to sustain the repairs; to which the Plaintiff demurred, & per Curiam, albeit the Lands be evicted, the Rent shall be paid for the House. And Judgment for the Plaintiff. (80) Rent.

Javan *and* Badilee. Ante.

JUdgment was Reversed, Dower being void for the third part of an intire House. (81) Dower.

George *and* Shepherd.

ON consideration the Plaintiff accepted 40 s. for share in the Will of Shepherd, the Defendant assumed, & licet sæpius, the Defendant had not paid, on 1 Leonard 123. Delaby & 3 Cr. 834. East. Gold said no notice was necessary, it being specially said that the Defendants refused to pay; and being after Verdict the bringing of the action is a sufficient notice of the Plaintiffs acceptance. And Judgment for the Plaintiff. (82) Assumpsit

Palmer *and* Brown. Ante.

THE Court conceived this was no departure, but timely enough shewed, for the arrest on breaking open the House is unlawful as well as a distress; and the Defendant could not plead it before. And Judgment for the Defendant. (83) Execution.

Brown *and* Haywood. Ante.

COvenant on the word Grant in a Feoffment; the Defendant demurred, & per Curiam, this is no Warranty of a Freehold: 5 Co. Spencers Case, but only in case of a Lease for Years. And Judgment for the Defendant. (84) Warranty.

Gilmore

Gilmore *and* Isles.

(85) Baron & Feme. DEbt by the Plaintiff and his Wife as Administratoʒs, on Obligation conditioned to pay 100 l. in four days after demand: The Defendant pleads 12 Car. 2. Cap. 13. §. 2. of Usury, and all Bonds foʒ greater interest than 6 per Cent, from 1660 should be void, and the Defendant and Intestate Harbert agreed 10 Dec. 13 Car. 2. to pay above, and so void; to which the Plaintiff demurred, because in recital of the Statute 12 Car. 2 Cap. 13. the woʒd Made is left out, and this Bond was made 1653 befoʒe that Statute; & per Curiam this is an ill Plea, altering the sense of the Statute. And Judgment foʒ the Plaintiff.

------ *and* Harrison. *Thursday*, Feburary 10.

(86) Church. SArjeant Hards praied Pʒohibition in suit against Executoʒ of Hassell Rectoʒ of Cherriton, foʒ dilapidations, being pardoned by 25 Car. 2. Cap. 5. §. 22. that except only suits, &c. and the Spiritul Court refuse the plea. Hales Chief Justice said the Statue pardons only contempts and Excommengements, as foʒ non paiment of Tythes; but the right of Tythes is not discharged; so of Utlary in personal action being of particular interest, and Pʒohibition was denyed.

Dominus Rex and Eeds. *Friday*, Feburary 11.

(87) Trades. BUgby excepted to Indictment on 5 Eliz. Cap. 4. foʒ exercising the Trade of a Thʒedmaker, not having serʒed Appʒentice, because 15 Car. 2. Cap. 15. §. this Trade is allowed, and so the foʒmer Statute impliedly repealed as to this; but per Curiam, this being matter dehors, it must be pleaded, being no Pʒoviso in the same Statute, which might be Evidence upon Not Guilty; and this is no general repeal; In which case by Wild Justice he may plead not guilty, which Rainsford agreed; contra upon an implied Repeal of particular offence as this is; and the Court refused to quash it without other exception. Hales Chief Justice absent.

Carter

Carter *and* Pecke. Ante.

(88) Church.

MAsters excepted against Prohibition prayed by Executor of Administrator in suit for Dilapidations on Oath that the Executor had no Goods of the first Intestate, being sued there to execute sentence against administrator on fully administred pleaded to all but 50 l. of the Intestates Estate, but never proved; and in default thereof sentence, because perhaps the Administrator wasted the Goods after his Plea, and therefore at least as to the 50 l. is liable, de bonis propriis; but per Curiam, the Executor of the administrator is not liable, unless he hath Goods of the first Intestate, or be administrator de bonis non Administrat. by the administrator, & per Curiam the Prohibition to stand.

Wakeman *and* Waker. Ante.

(89) Leases.

WAllop excepted to Replication, that the Lease is habendum to Lloyd and his Heirs for three lives, which on 1 Inst. 3. and 3 Cr. Mustard and Coulter is ill, as well by way of use as otherwise, though the deed were inter A. and B. and witnesseth that the said A. leaseth, not said to whom, Habendum to B. but it being farther said per script. hic in Curia prolat. and the deed of Lease it self went to Lloyd and his heirs, Habendum to Lloyd and his heirs for three Lives, per Curiam it was amended.

Etheridg *and* Etheridg.

(90) Ordinary.

WIlliam having bona notabila proved the Will in the Arches, and being now cited by Henry out of the dioceſs of Hartford, for Legacy: Mountague prayed a Prohibition upon Co. Entr. 448. Prohib. 1. and 1 Cr. 97. Smiths Case, where prohibition was denied only for being after sentence, and 23 H. 8. Cap. 9. §. is, Proviso that the Statute shall not extend to Citations for Probate of a Will in the Prerogative, but 13 Co. 2. Potters Case, is that this Case is Stricti Juris, and all other Cases may be prohibited. 2. The Will after Probate is transmitted into every Dioceſs whither soever Executor removes; and Legacy may be sued for where the Executor lives. But by Hales Chief Justice the constant usage being to sue in the Prerogative, and Inventory and Security there; and no transmissions are but upon Letters of Request

Request by inferior Ordinary, and this citation may be by procurement of the Executor himself, therefore no Prohibition ought to be; but Curia Contra, that this will evade the Statute, and give a general Jurisdiction to the Prerogative-Court, and in every small legacy to bring the Executor from parts remote will be inconvenient: But Adjornatur, for Officers, &c. to attend.

Worthy and Buxton.

(61) Marriage. Serjeant Branston plaied Prohibition to York, in suit pro Incesto for Marriage of one Stephenson the Wives Sisters daughter; and in C. B. Harrison and Boroughs, Marriage of Great Uncles Wife was held good enough, and not within the Levitical degrees. Hales Chief Justice said the Wives Sister is by the best construction of the Levitical degree prohibited, and there is the same reason for her daughter. But by Wallop, that Read in the Middle Temple upon this Statute of 32 H. 8. Cap. 38. f. 2. this is not prohibited, to which the Court inclined, and Prohibition, Nisi.

Smiths Case. Ante.

(62) Administrators. Jefferies plaied Prohibition upon citation of Brother of the whole by Brother of half blood, to Sister deceased; on 2 Roll. 333. Sed Curia Contra, for being in the Ordinaries discretion to affect the proportion, the half blood is of kin, but Stet Prohibition for the Defendant to demur.

Dominus Rex and Slaughter. Ante.

(63) Slander. Serjeant Stroud on 22 & 23 Car. 2. Cap. 12. for the Defendant plaied Judgment for not selling according to Winchester measure, but per Curiam, 14 Ed. 3. Cap. 12. of the Standard is all one with Winchester measure; and the latter Act being Prohibitory Information here, is good upon that, being for selling against the Standard of Exchequer Communiter vocat. Winchester measure; and its not like Bakers Case, where there was but one particular Statute that directed the way of Information, which could be only in that way in the Country. Et adjornatur.

Dominus

Dominus Rex and Taylor. Ante. *607 Saturday,* Feburary 12.

THE Court fined him 1000 Mark, Imprisonment untill Sueties for Good behaviour for life; and Pillory at Gilford where the words were spoken, and at Westminster, Cheapside and Exchange, with a Paper for horrid Blasphemy, tending to Subvert all Government. (94) Slander. Bias Johnny

George *and* Shepered. Ante.

IN Action upon the case, on Colloquium, that the Defendant was supervisor of the Will of A. by which a legacy not said what, was paiable to the Wife of the Plaintiff, in consideration the Plaintiff Contentus foret, to accept 40 s. for that legacy, the Defendant promised to pay: after Verdict it was excepted in arrest of Judgment: That 1. here is no notice of the acceptance, sed non allocatur. 2. The life of the Wife is not averred, which per Curiam is ill, on Yelverton 184. pl. And 3. here is no consideration, the Plaintiff being at no prejudice, nor no benefit to the Defendant. Sed adjornatur. Assumpsit.

Ayers *and* Berry.

IN debt on 19 Car. 2. Cap. 3. §. 8. after Verdict Williams excepted in arrest of Judgment, that this being for money due on party Wall against the latter builder, because there is particular remedy given by the Act, sed non allocatur, for albeit the Mayor, &c. may regulate difference of building as to the offence to stop the building, yet this being a duty vested by the Act, the party hath election either to stop the building, or having permitted it to be built, to bring debt for the duty, there being no exclusive words in the act but only without other appeals, which supposeth a sentence: but the original suit may be here, and this being a private Statute must be taken to be pleaded, unless nul tiel Record had been pleaded: And Judgment for the Plaintiff, Nisi, the value and interest being set forth. (96) London.

(97) Judges.

NOta, that on Sunday the 20th of Feb. 1675. Hales Chief Justice being 68 Year old and infirm, but in ful vigor of mind, surrendered up his Patent or Writ of Chief Justice of B. R. unto the King in Secretary Coventries Lodgings, and went off much lamented: and died on Christmas day 1676 at Atherly in Glouceſter, his Paternal ſeat. See his Life writ by Dr. Burnet.

DE

DE
Termino Paſchæ

28 *Car.* II. in *B. R.* Anno 1676.

Wedneſday, April 12.

Rainsford Ch. J. } *Wild.*
Twiſden. } Jones made *Thurſ.* Ap. 13.

Dominus Rex and Sir Gobert Barrington. *&c.*

ROtheram excepted to Indiament of three, &c. quod aſſemblaverunt ea Intentione ad diſturband. pacem modo Guerino in terrorem Populi, that its not ſaid in what particular fact the Rout was: Which by Twiſden is ill; but by Wild Juſtice the opinion of all the Juſtices was that ſuch an Indiament lay for unlawful Conventicles by reaſon of the words in terrorem Populi, the Court having nothing to do with the intent of Religious Worſhip, which Rainsford agreed on; 14 Car. 2. Cap. 1. §. 2. the Court would not quaſh it. (1) Peace.

Dominus Rex and Philpot. *Thurſday*, April 13.

MR. Attorny being to ſhew cauſe why the Defendant being Indicted for ſpeaking words of the Mayor of Dublin, that were erronious, might not be admitted to aſſign Error by Attorny on Judgment in Ireland, he ſaid it was againſt the courſe of the Court: And to this Twiſden Chief Juſtice inclined; but by Rainsford Chief Juſtice and Wild, he may be admitted by Attorny as being founded on a Civil (2) Attorny.

action; and no Habeas Corpus on the Civil side, ad faciendum & recipiendum lieth into Ireland: but only ad subjiciendum. But ex consensu of Mr. Attorny Jones, the Court granted leave to assign the Errors here by Attorny.

Brooks *and* Turner. *Modern* 211. pl. 44.

(3) Baron & Feme. SAnders plaied Prohibition on Plea that the Wife of the Plaintiff, who was Covert, on articles before Marriage, with two of her friends was to be permitted so to do, and the Husband to pay legacies devised; and that the Husband ought to have administration, there being a Surplus of things in Action, the Plaintiff claimed by vertue of the Will; & per Curiam, her Will is void, and the Husband bound only by the articles to permit it: and Prohibition, Nisi.

Hancock *and* Wayman.

(4) Tryals. LEake excepted in arrest of Judgment in Ejectment, that a Venire facias is to Coroners without any Suggestion at all of any challenge to the Sheriff, &c. which is not aided by 21 Jac. Cap. 13. §. And per Curiam this is not aided by 16 & 17. Car. 2. Cap. 8. §. though the right be here tried, and the Court cannot mend this direction of Process to a wrong Officer; & per Curiam Judgment staid, for the Court cannot examine the truth without a Suggestion.

Grene *and* Warner.

(5) Slander. HOlt excepted in arrest of Judgment in Slander, saying of the Plaintiff she had murdered A. her late Servant, not averring she was dead: which on Hob. 6. pl. 12. Miles and Jacob, and on 13 Co. 71. is ill; sed Curia contra, if she were not dead, or if there were no such, the greater Scandal. And Judgment for the Plaintiff, Nisi.

Perkins *and* Delawn. *Saturday*, April 15.

(6) Trades. THomson excepted in arrest of Judgment in debt on 5 Eliz. Cap. 4. for 11 months exercise of Trade without being Apprentice, Verdict is for three months parcel, not said which three months, as in debt for arrears of Rent two Years, on nil debet, Verdict of parcel, and nil debet for the rest,

reſt, not ſaid what arrear, held ill. So in debt for Tythes on two ſeveral Titles Verdict of part, and nil debet for the reſt, not ſaid which, held ill: but per Curiam the caſes are not alike, for Verdict is well enough, contra for Rent or Tythes. And Judgment for the King.

Danwood *and* Godſcall.

(7) Copyhold.

IN Aſſumpſit to pay on Surrender of Copyhold. Finch excepted in arreſt of Judgment, that its not averred that the Plaintiff ſurrendred the ſaid lands according to the cuſtom of the Mannor; nor ſhewing the Surrender it ſelf, that the Court may judge of the Validity thereof; as 22 Ed. 4. but being ſaid a Surrender Secundum agreement, and Verdict on non Aſſumpſit, its well enough. 2. Its to pay on demand on penalty, and no demand alledged; ſed non allocatur, this being only for the principal ſum, not for the penalty. 3. Its Indebitatus on ſale of Copyhold, which lieth; not ſed non allocatur, lying as well as on Bargain and Sale of Land; contra on aſſignment of Judgment, &c. And Judgment for the Plaintiff.

Southby *and* Wiſeman. Ante. *Monday*, April 17.

(8) Market.

WIlld Juſtice ſaid that if I give my Servant Money I ſhall not anſwer for what he buyeth on truſt, but if I ſend ſometimes on truſt, or pay ſcores, I ſhall anſwer; and here the Defendant paid every night to the Servant for the next day, and approved the Plaintiffs Bread, but knew not the Plaintiff as a Baker, and the parties agreed to make a Caſe or go to new Tryal this Term, Entry of Poſtea being ſtaid.

Coply *and* Dockcuanque.

(9) Bankrupt.

ACtion upon the Caſe on Indebitatus to pay debt aſſigned by the Commiſſioners of Bankrupts; the Defendant pleaded the Statute 21 Jac. 16. §. of limitations, and that Cauſa accionis non accrevit infra 6 Annos; to which the Plaintiff replieth frivolouſly, that action was begun in the Mayors Court, &c. to which the Defendant demurred: But

But by Weston for the Plaintiff, this debt is not within the Statute of limitations, and so it hath been adjudged in Common Bench, no more than a Scandalum Magnatum. Et adjornatur.

Dominus Rex and Devall.

(10) Peace. EX motione Sanders for Certiorari, and to file order of Sessions for Wages of Coachman in particular Liberty, the Court agreed that the Justices ought not to meddle with other Wages than in Husbandry, 5 Eliz. Cap. 4. and the rest is but incroachment, and so it was filed. post. 640. pl. 45.

Bull *and* Palmer.

(11) Rent. INdebitatus for Rent on Lease by the Testator, and Assumpsit in the same Declaration against the Defendant on Insimul Computassent with the Plaintiff for the same Rent, as Executor. Harris praied Costs on Nonsuit, because the accompt was in the Defendants own time; and to this Wild Justice inclined strongly on conversion by Executor in his own time, which is within the reason of 23 H. 8. Cap. 15. so 1 Cr. 219. but a general Indebitatus on accompt, if the party be found as Executor its ill, and so hath been adjudged, and so in Assumpsit on actual promise to him, he shall pay Costs, which Rainsford Chief Justice agreed; contra by Twisden, and that an Accompt will not lie barely for Rent; which Rainsford Chief Justice agreed, unless expressed for that and other things, as Tares. Et adjornatur.

(12) Religion. IN Information on 23 Eliz. Cap. 1. §. 10. at Stafford Assize, the Defendant after the Jury sworn came into Court and conformed, and Special Verdict find this; and whether this save charge or not was the question, & per Curiam, any time befor Judgment Conformity is sufficient, and to be taken most favourably.

Gee

Gee *and* Mansfield.

IN debt for Rent, the Defendant pleads that one Maxie was seised before the Lease by the Indenture made to the Defendant, and that the Plaintiff entred by disseisin on Maxie, and that before any Rent due Maxie entred on the Lessee; the Plaintiff replieth that he was seised in fee at the time of the Lease absque hoc, that he disseised Maxie; to which the Defendant demurred, because on 30 H. 6. 7. the traverse of the disseisin is ill; sed Curia contra, that either the Bar is ill by disseisin or else the traverse is Good; and this is the principal matter, and if Maxie had never entred on the lessee the Rent is due notwithstanding the disseisin. And by Jones Justice, the Plaintiff hath election to traverse either the disseisin or entry without making title to himself. And Judgment for the Plaintiff. (13) Disseisin.

Baker *and* Hill.

IN debt on Inland Bill by custom of Merchants, the Defendant pleads an Original, and Attachment in the Sheriffs Court in London; to which the Plaintiff demurs, & per Curiam, this is but in abatement, unless it had been pleaded that a Judgment was thereon: And by Wild Justice, taliter processum est that Judgment was, is not sufficient, but the four Defalts; and Judgment must be pleaded specially as Co. Entr. and Judgment. (14) Merchants.

Galfrid *and* Curwin.

THE Court held the Obligation to appear before the Kings Majesties Justices at Westminster in B. R. on Writ to appear Coram vobis ubicunque, and albeit this were on Latitat which is on the day of Return certain, and not by Original, for the end of the Statute was to prevent Extortion, and this is good in substance. And Judgment for the Plaintiff. (15) Sheriffs.

Dominus Rex and Rice.

MR. Attorny prayed a Writ of privileg for debt being actually Constable of Beramsted Hundred in Essex, and living at Wansted, there to be during that service exempted from being chosen Collector for the Poor in Cornhil (16) Constables.

hill in London, where he first lived; as in the Case of Quincanton, where on Special Verdict it was agreed that he that is chosen for private Leet shall not during actually such be chosen in the general Leet, and a Writ was granted per Curiam.

Dominus Rex and Pine. *Tuesday*, April 18.

(17) Trades. SArjeant Stroud excepted to Presentment for not taking Apprentice, put by the Overseers of North Curry, on the Defendant ocupier of Lands in Curry Mallet in Somersetshire, because not compellable by 5 Eliz. Cap. 4. §. 25. 1 Jac. Cap. 25. §. 23. on Steers Case, nor 43 Eliz. Cap. 2. §. 5. to take any Apprentice. Also 2. its not said what age the Female Apprentice was. 3. One Parish cannot put an Apprentice on another; and the case in point, as the resolution of all the Judges was but the answer of the Lord Chief Justice Heath and the other Judges all denied it, by Twisden; But by Bigland, Dominus Rex and Canter, and Dominus Rex and Gilliflower, Three Judges against Twisden held that the Parish may bind Apprentice to any, and now per Curiam præter Twisden, it would be in vain to enact that Parish bind unless the Defendant be forced to accept; but Twisden Justice held it very unreasonable that Justices may put an enemy into my House, or to put him on any Merchant. Sed adjornatur. 605

Taylor *and* Watkinson.

(18) Excommengment. ON F. N. B. 64. and Register 68. and Williamson and Hobert. Crosts plaied Supersedeas of an alias Capias Excom. because granted pending an Appeal, which the Court granted if the Return of the Excom. Capiend. be out, else it must be taken in Chancery, though in Record here, and a Mandamus to the Bishop to certifie the Record of Appeal.

Dominus Rex and Garton.

(19) Taxes. LEvins excepted to Indictment for not paying reasonable Assesment by Neighbours to the use of the King; and also to the use of the Town, & per Curiam, it was quasht, and Indictment lieth not for non-paiment of Poor or any other Tax but Distres, &c. unless given.

Irish

Warrant of Commitment not being under Seal, its ill. Sed adjornatur. 635 pl. 33.

Earl of Shaftsbury *and* Lord Digby, *Wedneſday*, April 26.

(26) Slander.

UPon a Trial at the Bar the Evidence was in Action. ſur Stat. 2. R. 2. Cap. 5. de Scandalis Magnatum, ſaying, 17 Car. 2. That you are againſt the King, and for ſeditions and factions, and for a Commonwealth, and this I will prove, and by God I will have your Head next Parliament, ad Damnum 20000 l. Which was proved by four, and on other Circumſtances the Lord Moon put the Court to declare their opinions, that a Peer produced as a Witneſs ought to be ſworn, becauſe he ſaid the Houſe of Lords had made an Order contra. Verdict for the Plaintiff, and a 1000 l. damage.

Burdet *and* Ilman. *Thurſday*, April 27.

(27) Execution.

ON report of Lineſy Secondary, it appeared that the Plaintiff and Defendant had both taken a Fieri Fac' Teſte the ſame day againſt Love & nulla bona Ret' & Fieri Fac' de bonis Eccles', and Sequeſtration at ſuit of both the ſame day, but one was delivered to the Biſhops Regiſter firſt, which by Wild Juſtice ought to be preferred; but by Twiſden Juſtice, where two Executions are of the ſame Teſte, the Sheriff may prefer which he will; but per Rainsford Ch. Juſt. they muſt divide it; but notwithſtanding Regiſter Jud. 22. Orig. 300. a Writ to deliver the Lands tenend' ut liberum tenement', was ſaid by Polyxphen to be a void Writ, and per Curiam the Lands cannot be delivered by Fier' Fac' but the profits; and in Harwood and Paytons Caſe it was held when there was no Biſhop that an Elegit on 13 Ed. 1. Cap. 18. lyeth not de terris Eccleſiaſticis, and the Plaintiff is a ſtranger who cannot take benefit of excepting to the Defendants Writ, albeit the money be in Court, and no return made. Poſt.

Selby *and* Hudſon.

(28) Lieu.

ERror of Judgment in Cheſter in Action upon the Caſe in conſideration the Defendant agreed to divide what he received of Middletons debts from other perſons, the Plaintiff would divide, Middleton being indebted to Plaintiff and

Defendant; Williams excepted that it doth not appear the cause of Action arose infra, viz. where the debts or agreement were: 2. Here is no consideration, being no more then agreement to divide anothers money, and no trouble, as on recovery of the debts, which cannot be assigned neither without maintenance, but being on the agreement of Middleton, that his Creditors should receive, &c. its well enough, and as to the first exception Bell and Peacock's Case Indebitatus in Durham for Wares sold, not said where was held well enough, and so here after a verdict, the course of County Palatine being not to declare infra, &c. as in Marshalley, and nothing appearing out, Judgment Affirmed.

Pigot *and* Lord Salisbury. Ante.

(30) Fines.

MIntern and Uxor seised for life, the Remainder in Tayl to Lee, (Remainder to Husband for life, of the Reversion least to Nitinghal, who assigned to Coleborn) levied a Fine of the Reversion sur concessit to Darcom of a moity, & quicquid habent, for term of their lives, habend' to the Conusees in fee pro tota vita of Mintern and Uxor, and the longer liver; Coleborn attorned, and after in the same year Olive Lee an ancestor of the Lessor of the Pl', and Mintern and Uxor bargained and sold to the Defendant with Warranty of Olive, which descends on the Plaintiff, and after Mintern and Uxor levy a Fine to the Defendant. Maynard Kings Serjeant for the Plaintiff, said all the stress lay on the first Fine sur concessit, and the Warranty and the latter fine works nothing, and unless that fine pluck up the Reversion, and so let in the Warranty upon the Entail to Olive, it passeth only the Estate for life in Mintern and Uxor divided as they had it, and shall not work a wrong to pass both Estates intirely, notice being taken in the very fine sur concessit it self by the totum & quicquid habent of their several Estates, and this is a construction lawful which shall be taken in Conveyances on general words, and not so as to make a forfeiture: Both had Estates for life, the Wife with Remainder in Tayl, the Husband after her death for life, Lit. 138. & 8. Ed. 3. 3. (Seu) pl. R. Tenant for life infeoffs B. for life of B. and if B. dieth, living A. that it shall return to A. this saves the forfeiture expresst before, and 6 Ed. 3. & 1 Inst. 41. Lease by Tenant in Tail, not saying for whose life before 13 Ed. 1. Cap. 1. de Donis was for life of Lessee, but since shall be taken to be for life of the Grantor,

& 1 Co.

& 1 Co. Bredons Caſe, where Tenant for life, Remainder in Tail by Interpretation is taken by fine not to work a wrong, but Tenant for life continues. So Hob. 277. Tenant in Tail Remainder for life joyn in a fine, this is no diſcontinuance but paſſeth a lawful Eſtate, 2 Cr. 301. a Covenant to hold for years, and to pay rent, hath been adjudged a Leaſe and Reſervation, and ſo pleadable, and not as Covenants alone. Covenant to enjoy from year to year for ten year is no forfeiture of a Copyhold, though a good Leaſe for ten years of a Freehold: 2. From the quality of the Eſtates that the Grantors have where it may be without wrong it ſhall be according to what the Grantors have, eſpecially being ſur conceſſit, this plucks no right out of any perſon as a Feoffment doth, 1 Hen. 7. 22. Bar. & Fem Tenants in ſpecial Tail, he dieth without Iſſue, a fine levied to her by a ſtranger eſſe jus of the Wife, ſed non come ceo with Remiſe to her and her heirs, the acceptance hereof was adjudged to be no forfeiture; and Raſt. 349. b it appears in the Margent this is the ordinary form of a fine by Tenant for life. A fine come ceo not only eſtops parties, but operates on the poſſeſſion, but a fine ſur conceſſit is only a concluſion to the parties, and is but an attempt of a forfeiture, and paſſeth no Eſtate; ſo where he that hath a Baſe Fee, as Altonwoods caſe, 1 Co. bargains and ſells, and after levies a fine, and then the Deed is enrolled, this paſſeth only the Baſe Fee, and the fine a confirmation. Polyxphen for the Defendant, ſuppoſing there had been no Leaſe in being, but it had been of an Eſtate in poſſeſſion, it appears by the Habendum which is that which only aſcertains the Eſtate, as in 2 Co. 55. & 2 Co. 24. & 8 Co. 58. and this is as plain and particular to paſs an intire Eſtate, therefore ſhall not be controulled by the Premiſſes unleſs more particular and contrary; ſo the totum & quicquid habent will not controul the Conceſſit for term of their lives, this being a form of aſſigning a particular Eſtate cannot be taken in any other ſenſe but a poſitive aſſertion, they have one intire Eſtate for their lives, and the longer liver of them, and no conſtruction can be made by matter, dehors the fine that this ſhould be ſupplied by preſent Eſtate for life in the Wife, and a Remainder for life in Mintern the Husband after an Eſtate Tail, 27 H. 8. 24. a fine of totum ſtatum would never be admitted for uncertainty, the totum & quicquid, Weſts Preſidents 22. 25. is on Grant of a particular Tenant to make certain the Eſtate granted, which is uſed by the Plaintiff to confound

the

the Estate into whatever the Conusors had at the time of the fine levied, and hereby fines will be a more doubtful Conveyance than a Deed, for had totum & quicquid been in a Deed it had passed but one intire Estate, whatever Estate the Feoffor had; if there be no certainty in the Deed it must be construed by the Estate in the Grantor, as of totum Statum & 8 Ed. 3. 3. and the Cases of Covenant, Lease; but in this Fine there is an express Estate limited to Baron & Feme for their lives, and the longer liver, which shall not be controuled by construction dehors; for Mintern and Uxor might have granted for both their lives, and could not use other words to do it, 1 Co. Bredons Case saith not that two Estates pass by the Fine, but only one determinable on the death of Tenant for life, and in Tail, so on Lease by them, and 2 Cr. 696. Jones 55. Eustace and Scowen the Plaintiff and Susan joint Tenants for life, with Reversion to Scowen, a Fine by Susan and her Husband and Scowen to the Plaintiff the other joint Tenant as this is being only as a release, though it do operate as several Estates, and the totum & quicquid is not taken notice of by Jones 55. therefore not material; and Dyer 339. Tenant for life, Remainder for life, Remainder in Tail, Remainder in Fee to Remainder for life, the Tenants for life joyn in a Deed Confirmaverunt & tradiderunt is held a forfeiture, yet as lyable to construction as here, and Roll. 854. Garret and Blizard is the nearest to this Case, that construction shall not be to pass Estates by Fractions: 2. The present Lease for years makes no alteration, Pl. Com' & 5 Co. Teyes Case, Fine is compared to Judgment in a Writ of Right, whether sur concessit or come ceo, and therefore doth affect the Land, as 1 Inst. 362. 1 Co. Pelham Case, and 10 Co. 44. Jennings Case being a discontinuance, unless by consent, yet then it had been a devesting; and 5 Co. Dormers Case, the Termer was of no value, nor had no remedy before the Statute of Gloc. Cap. 5. therefore shall not hinder the devesting, 1 Inst. 342. b and a Fine sur concessit executed is as strong as come ceo when executed, and so of a Fine sur Conusans de Droit tantum, and here the Execution is found by the Attornment, therefore there is a devesting; the Court agreed the Lease makes nothing, being a Fine executed by Attornment, also a Fine sur concessit executed would be a forfeiture, and here by Twisden Just. the Fine is Concessit Tenementa prædicta, which shall not be controuled by the & totum & quicquid habet, which Wild Justice agreed, Et adjornatur.

Dominus

Dominus Rex and ----

TRemayn excepted to the Indictment of Trespass in inferior Court, because in English, which the Court agreed, ill, because this cannot be pleaded, nor other remedy; but per Wild Just. 36. Ed. 3. Cap. 15. extends not to Indictment, but only to Pleas to be Enroll'd in Latin, & adjornatur. (38) Indictment.

Dugard *and* Crump, *and* Uxor.

IN Trespass against Baron & Fem, of keeping Dum sola, Dogs, scienter accustomed to bite Sheep, on 2 Cr. 5. pl. 6. it was excepted in Arrest of Judgment, that the Husband and Wife are found guilty, which in Hoblin and Courtis in C. B. ex motione Mr. Justice Jones, while Serjeant, Judgment, stayed and was held ill, and so the Court inclined now; But had the Postea been endorsed non culp. generally, it had been well enough, and here the Defendant having pleaded non fuit culpabiles, the verdict must be accordingly, & adjornatur. (39) Bar. and Feme.

Parker *and* Ayrs. *Saturday*, April 29.

IN Ejectment on Lease of Good, the Plaintiff claimed as Heir general of Hulls by a Fine, and Marriage to lessor of the Plaintiff, by Lettice the Daughter of Elizabeth the Wife of Hulls; the Defendants title was precedent by Recovery suffered by Hulls, with power to limit by Will; and the Will was as to the Farm, and all Land within possession of K. within the Mannor of R. and Parish of N. I devise my said Farm and all my Lands in the occupation of K. in the Mannor of R. and N. ubi no part of the Farm was in R. per Curiam, this passeth Lands in possession of K. in the Parish of N. though no parcel of the Mannors of R. or N. 2. Hulls suffered Recovery to the use of himself for life, Remainder to the Wife for life, Remainder to Lettice in Tail, Remainder in Fee to himself; with power to appoint otherwise, and devised on the death of Lettice without Issue to Elizabeth in Fee, who married the Defendant, and they 1654 levied a Fine to the use of the Defendant in Fee; then Lettice died leaving issue, that died without issue, King the Tenant being in possession by Lease; & per Curiam, this Devise were there no power, is good by Hulls out of his Fee simple: And 2. the contingent is not destroyed by Fine of Elizabeth, being (40) Devise.

no bare power but with interest, but they gave leave to find both points specially.

Henningham *and* Vossious.

(41) Devise.

ON Devise of Brown to his dear friend the Defendant during his Exile, and if that it should please God he be restored to his Country or dye, to the Lessor of Plaintiff, the Defendant being a Dutchman, and at the time of the Will under a Proclamation of War 1672, by England against the Dutch 1673. on Decemb. 6. the Will was; and by the Plaintiff, this is but a limitation; the Defendant appeared to come into England before the War, on loss of Pension of Historiographer there to the States of Holland; the Court agreed that Devise to A. during Exile, that was not Exile, is for life; but by Exile here must be ment only a restraint of fear during the War, and Verdict Special in Ejectment by Pagit lessee of the Lady Henningham. Post.

Wilkinson *and* Lloyd. *Monday*, May 1.

(42) Covenant.

IN Covenant by W. on one, part and Guy and Lloyd on the other Conjunct. & divisim not to joyn in any lease with any other in taking the Farm of Excise. Serjeant Pemberton excepted in arrest of Judgment after Verdict, on 5 Co. Slingsbyes Case, that this action ought to be brought jointly against Guy and Lloyd, and that its ill brought against one: In case of a Charter-party, the interests are several, and therefore the action may be so; contra here, both might have joined, or they might have had it severally. The Court inclined this lay well enough by one against two, or two against one. Sed adjornatur.

Richards *and* Ceely.

(43) Leases.

EJectment of Lands in Cornwal, Special Verdict finds Tho. Ceely seised by Custom of Penrin demisable for lives, that Tho. and Peter Ceely were Obliged in 100 l. to J. S. and Tho. gave a Counter-bond to Peter against it, and then Tho. made a Bond to Peter, Granting, Covenanting, and agreeing on recital of the Bonds, and his

his Estate, that Peters Executors and Administrators shall enjoy from making for 7 Years, and so from Seven to Seven until 49 Years, if Tho. live; provided, if Peter be saved harmless and the money paid according to condition, to be void, and if this be a Lease or not was the question, there being an after Lease by which the Defendant claimed. And by Pemberton Serjeant for the Plaintiff this is no Lease Hob. 35. Tisdel and Essex, and Noy 14. Whitlocks case, and Noy Wises Case, though in some cases it doth make a Lease, yet not here, because it may be used as a Covenant: and this being a Copyhold Estate, if this be a necessary Lease its a forfeiture of the lessors Estate and the lessors Security, therefore the intent of the parties must be considered: 2 Cr. 172. Evans and Thomas, the Fine not being levied, and so no Estate passed, the question was if the Covenant were a Lease, the rather because the Covenantee Covenanted to do no Waste; and though it were agreed the Covenant single would be a Lease, yet not being so intended by the parties, but a present Fee, and adjudged it was only a Covenant to enjoy; and so Noy 128. Articles of Covenant to hold Close rendring Rent with distress; and agreed the Articles to be ordered by Counsel, which was adjudged no Lease; and in the Case in question the parties intended no forfeiture, nor would it be any benefit; but a direct Covenant to hold the Land it might make a Lease, but contrary of Copyhold Estate, as a Release by Copyholder to his lessee and his Heirs is no forfeiture. Newdigate for the Defendant that this is a Lease, 5 H. 7. 1. is not different of Copyhold, 2 Cr. 301. Lady Mountagues Case, if there be words full enough to make a Lease, and Drake and Monday, 1 Cr. 207. pl. held this is a Lease in Case of Copyhold, doubtful words, as Hill. 15 & 16 Car. 2 in C. B. Rot. 233. Holt and Thomas's Case, agreement to hold to halves was held no forfeiture; 3 Cr. 143. Hart and Ceely, and 3 Cr. 483. and 1 Roll. Estates where the Owner of the Land Covenants to enjoy, it will be a Lease, contra of a Stranger: and here is no title of the Lord in questions, but only between lessees, which shall first Commence. Ellis Justice the Covenant to hold is from seven Years, and during the seven Years there is no Estate passeth: But by Atkins Justice, From and For are of the same sense, being for 49 Years from making: also here is no question upon any forfeiture but between the parties, and a Licence shall in this case be intended; & per Curiam, on the words granted it must be a present Lease and makes a forfeiture. But North Chief Justice conceived this cannot be a Lease between partis, and no

Lease as to the Lord: But Adjornatur, and by Winham if it cannot be thought the Lessee would deliver up his Bond to take a covenant barely.

Pidgeon *and* Trent.

(44) Admiral. SAnders plaied Prohibition to the Admiralty, on 22 & 23 Car. 2. Cap. 26. §. 11. in suit there for forfeit of a Ship on selling Wares in Ireland without breaking Bulk, being put into Ireland from America by contrary Winds, this being tryable in the Plantations or any Court of Record in Westminster; and Prohibition granted, Nisi.

Dominus Rex and Devall. Ante. 626. pl. 10.

(45) Poor. SAnders plaied Confirmation of Order of Sessions against the Defendant for paiment of his Coachmans Wages, on 5 Eliz. Cap. 4. §. 15. & per Curiam it was confirmed, Nisi. 642. pl. 52.

Dominus Rex and Smith.

EX motione Win to set down demurrer to Indictment of Setting Posts in the Thames, ad nocument. The Defendant pleaded the Act of Pardon, 25 Car. 2. Cap. 5. §. 15. to which the Plaintiff replied that in §. 19. Highways and Bridges are excepted, which for the King was conceived to extend to the Thames. Et adjornatur.

Dominus Rex and Kneeland. *Tuesday,* May 2.

(46) Taxes. MR. Jones excepted to Presentment, for not paying Assessment made debito modo by the Inhabitants of Dunham in Lincolnlinsey to the use of the Constable, because the Statute 43 Eliz. Cap. 2. §. 13. appoints distres. 2. The cause is not shewed whereby it may appear reasonable, which per Curiam is ill for both causes, for this may be a rate to his private use, and not any Constables rate. And 3. being not said contra Pacem it was quasht.

Pascal

Pascal *and* Wood.

IN Ejectment of Copyhold in Essex, the Plaintiffs title was as Lord on felling Timber, and selling it off the Land, for Ashes in his Ancestors time. The Defendant Evidence was first by the Plaintiffs justification by plaint in Trespass by the Defendant for taking Heriot; & per Curiam, justification for Heriot Service on seisin of Ancestor, is an acceptance of Heir as Tenant, and purgeth the forfeiture; contra on acceptance, Justification or Avowry for Heriot Custom: 2. There being an actual Entry in the life time of the Ancestor by the Lord for the forfeiture, no acceptance after will purge it; and though this were never presented by the homage, that is not material being a thing notorious, and the homage refusing to present three, the cutting was only in three Acres, which per Curiam is a forfeiture of all the Lands granted by that Copy, but by consent of the Plaintiff, Verdict for the Plaintiff as to the three Acres. (47) Copyhold.

Dominus Rex and Philpot. *Wednesday*, May 3.

ERror of Judgment on Indictment for saying the Mayor of Dublin endeavoured to ruine me by false Witnesses, and offered to make C. an Alderman if he would swear against me; and he laboured to destroy me in my Life and Estate, & multa alia diversa Scandalosa, verba, because Judgment was quod finiretur for quod finem faciat. 2. No Capiatur. Et per Curiam its ill, but the alia verba is void, and no damages intended for them. (48) Slander.

Comes Shaftsbury *and Lord* Digby. Ante.

SArjeant Scrogs excepted in arrest of Judgment that 2 Rich. 2. Cap. 5. is misrecited, that none be so bold as to tell false tales, speak or contrasciend. which is ill as 2 Co. Cromwells Case, and 2 Cr. 133. Parkes Case, upon 5 Eliz. Cap. 4. §. Admitteret for Amitteret held ill, though forisfaceret might be sufficient, sed non allocatur, contrasciend. being proper for devising without Anglice, Rast. 593. and Heron. 2. That the Statute is between the Lords and Commons, and the declaration is Infra Regnum which were a variance, but was mistaken, Ideo non allocatur. 3. Its that the (49) Slander.

the Defendant dixit of the Plaintiff diversa nova, falsa & mendacia, Comite existente, hæc ficta verba, not said, viz. Sed non allocatur. 642. pl. 53.

Hill *Executor against* Tilly.

(50) Assumpsit. IN Indebitatus by the Plaintiff for Wares by the Testator sold at the Defendants request to one Silverton, it was excepted in arrest of Judgment that Indebitatus lieth not; and its not like Nethersoles Case, Pave the Street and I will see you paid, after Verdict held that Indebitatus lay: So by the Surgeon upon cure on request of a stranger. But by Wild this Indebitatus would go to the administrator of the Executor whereas the other Assumpsit as Executor goeth to the administrator de bonis non, and Judgment staied.

Brown, *&c. and* Daniel. Ante. 641. pl. 45. *Saturday*, May 5.

(51) Poor. SIR. James Butler praied to set aside Order of Sessions for paiment of Coachmens wages, being not within 5 Eliz. Cap. 4. §. 15. or if they were two, it must be returned they were hired for a Year, and that the Sessions assest the Wages; which per Curiam are both fatal exceptions, and the party hath remedy at Common-law, as for Boardwages, which are not within the Statute, & per Curiam it was quasht.

Earl of Shaftsbury *and Lord* Digby. Ante. 641. pl. 50.

(52) Slander. SArjeant Stroud excepted that the Statute of 2 R. 2. Cap. 5. is miscecited in the enacting clause, de aliquibus magnis officiariis Cancellario, Thesaur. Justices magnis Officiariis, not said (ac de aliis) magnis Officiariis, and to this the Court strongly inclined, for else the Lord Great Chamberlain nor the Treasuer of the Household would not be comprehended within the Statute, as undoubtedly they are. 2. Mich. 2 Car. 1. C. B. Rot. 1533. Bishop of Coventry, Mich. 4. H. 8. Rot. 54. Mich. 1 Mar. C. B. Rot. Lord Sturtons Case, are all contra faciend. but Lord Peterborough and Mordant was devisavit Angl. did devise, but both are well enough. 2 Inst. 225. Sed adjornatur.

Wellings

Wellings *and* Stephens.

IN Covenant on Indenture of Apprenticeship made at D. the Defendant pleads deins age, not alledging any place; to which the Plaintiff demurred, & per Curiam, place is needless, this being tryable where the Indenture was made, but the parties agreed to wave demurrer and try. (54) Lieu.

Bull *and* Palmer. Ante.

IN Indebitatus in detinet only on Insimul Computassent to the Executor. Polyxphen praied costs on Nonsuit, being as his own debt, which was opposed, because it appears all was as Executor, and the suit in that right, as upon escape in Executors time. 2 Cr. 361. Barret. But by Wild this is a matter in the Plaintiffs own Cognizance, and the accompt is the ground of this Action, and need not be said as Executor, nor shew testament in declaration, but only in the accompt, and therefore costs are to be paid. Twisden none paied costs at Common-law, before 23 H. 8. Cap. 15. and this is only between parties, which is intended in his proper right, not as Executor, and whereever the Executor must make his title as Executor, though the debt accrew in his time, as here he shall not pay costs; contra in Trover on conversion in his own time, there he need not be named Executor; but here the accompt cannot be alledged to the Plaintiff generally, but must say as Executor; and 1 Cr. 29. and Hutt. 78. Peacock and Townly, is doubtfully reported, but must be ruled on that difference, which Rainsford Ch. J. agreed; and the profert literas testamentarias is not necessary, but aided by Verdict: so by Jones Justice, the Defendant shall pay no costs, for this money recovered shall be Assets, and the account is as Executor as on a collateral promise, & per Curiam contra Wild no costs. (55) Costs.

Joyner *and* Watts. *Hill.* 27 & 28 *Car.* II. Rot. 1001.

IN debt for Rent as administrator during minority of sir, averring that five are yet under the age of 17, and the other is above; which as Co. Pigots Case is ill, but on 22 & 23 Car. 2. Cap. 10. §. 2. Foster for the Plaintiff said it was well enough, because he that was of 17 was not able (56) Rent.

able to give a sufficient Bond to the Ordinary to take administration; but per Curiam he may do it by his Freinds, and this administration during Minority determins when any one comes to 17. as in case of Administrator during Minority of the Executors, he that comes first to age shall prove the Will for all; & per Curiam Judgment for the Defendant, for the Statute makes nothing in this case, nor can the Ordinary refuse granting administration to him that first comes to age; but the Plaintiff might have had leave to discontinue but would not, this demurrer being to try the opinion of the Court.

Strange *and* Greenhill.

(87) Obligation. IN debt on Obligation, upon Oyer it appeared to be in Quantaginta libris; to which the Plaintiff demurred, & per Curiam, its ill, and nil Capiat awarded: But by Wild Justice there is good remedy in equity to make the Defendant seal a new Bond upon this mistake of the Scrivenor.

Ayerl ------

(88) Way. SAnders excepted against Indictment in Leet of stopping Common Highway leading from a place called Up-End which cannot be, for every Highway must be from some publick place; but per Curiam this may be well enough; but wanting place where stopping, it was quasht: And so 2. was another Presentment for digging Turfe in the Lords Waste being but a prive at Nusance, &c.

Dominus Rex and Tewing.

(89) Poor. SArjeant Pedly excepted to order for Setlement there of a poor Child of Pigot, the Court refused to hear exceptions, but referred it to the Judge of the Assize of Hartford, being on difference between Parishes of Beddington in the same County, but if it were a difference between two Counties this Court would determin it; but they filed the Order being on appeal.

Smart

Smart *and* Dean. *Hill.* 27 & 28 *Car.* II. Rot. 1320.

(60) Merchants.

ACtion upon the Case on custom of Merchants, on accepting Bill of Exchange from Paris; the Defendant demurred after Issue offered on paiment, and excepted that no time appears when the Bill was patable, being only on double Usance, and no particular custom alledged that double Usance signifieth two Months; but non allocatur, it being a known term among Merchants that Usance is a Month, double two Months; and being averred he had not paid in two Months its well enough: and Judgment for the Plaintiff, The Defendant having waved advantage hereof by pleading paiment. But by Twisden Justice had it been on demurrer to the declaration, the Plaintiff should aver a particular custom that Usance signifieth a Month, &c.

Coply *and* Dugmying. Ante. *Hill.* 27 & 28 *Car.* II. Rot. 240.

(61) Bankrupt.

IN debt on assigment of Commissioners of Bankrupts; the Defendant pleads that no cause of action accrewed to the Bankrupt, Portington Infra 6 Annos; to which the Plaintiff replied ill, and the Defendant demurred: And by Weston for the Plaintiff by the assignment the debt is preserved, as in debt for Tyths. 1 Cr. 513. Tallery, and 1 Cr. 141. Scandalum Magnatum, and Hutt. 110. the Statute extends not to Rat. parte, nor 1653. in C. B. to this case being an extraordinary case, and the Commission being dated within the six Years, the Plea should have been Infra six Years after Commission; and the averring Causa actionis non accrevit to the Bankrupt is against the Record; but per Curiam this is no Estople; but the Defendant excepted to the declaration that no place of the assignment by the Commissioners to the Plaintiff is alledged, & per Curiam, though other matter be pleaded it being on demurrer, its ill, being the ground of the Plaintiffs title. Et adjornatur.

Elliot *and* Black. *Saturday*, May 6.

(62) Leet.

EX motione Jeofferies to punish a contempt in taking Goods by Distres in Leet after tryal in information against Cottager; and Not Guilty found, the Court ordered restitution: And by Wild the Presentment in Leet is not Traversable unless the same day, because every Resiant is presumed present. Twisden Justice contra where freehold is in question; Presentment may be Traversed at any time, and so where remedy is given in Leet by Statute as here, and the Plaintiff paying costs was left to debt on 31 Eliz. Cap. 7. §. upon the Presentment.

Dominus Rex and Eeeds.

(63) Trades.

BUgby excepted to Indictment in Coventry, on 5 Eliz. Cap. 4 §. of exercising Trade of Clothmaker, not having served seven Years, because by the Statute 15 Car. 2. Cap. §. being a general Law this offence is discharged; which Wild agreed, and Rainsford Chief Justice, but contra by Twisden, and that this latter Statute ought to be pleaded, and so not guilty; but not being said contra pacem it was quasht per Curiam.

Dugard *and* Crump. Ante.

(64) Baron & Fem.

EX motione Twisden for Judgment on 1 Roll. 216. pl. 11. & 3. Bulstr. 62. pl. 17. in Trespass against Baron and Feme, of Trespass dum sola, Issue quod Ipsa sunt Inde Culpables is void, and so is the Verdict, yet the Judgment is good; and this is the Defendants own fault thus to mistead, 1 Cr. 417. Needler and Symnel, and by this means the Defendant might force a demurrer, 44 Eliz. Croply and Cox's Case, 3 Cr. 883. and 12. Car. 1 Cr. and 1 Jac. 2. Cr. 5. pl. 6. and this the Court agreed, here being no mischief. 1 Roll. 216. Sed adjornatur.

Wood *and* Withers.

(65) Trespass.

TRespass of Quator Boviles vocat. Steers or Bullocks. Levins excepted in arrest of Judgment, sed non allocatur, this being but false Latine; or no damages for it, and the vocat. void. 2. This was intended for new Tryal the Verdict being against the Defendants, on not shewing Copy of the

the Judgment, and by Wild Justice, Baily or Officer need not shew Copy, but others must in justification of Execution; but where Baily and others are joyn'd its needless; and Judgment for the Plaintiff. Post 650. pl. 1.

Acton *and* Weyman. Ante.

(66) Amendment.

IN Ejectment on extent against Tenant of Sheriff, Process is taken to the Coroners, without any suggestion, and Bigland after Verdict pray'd Judgment upon 17 Car. 2. Cap. 8. the right of the Action being tried, and the Issue not altered, but per Curiam want of suggestion is not ayded, and Judgment stayed.

Pidgeon *and* Trent. Ante.

(67) Admiral.

MR. Solicitor excepted against Prohibition to Admiral, on 15 Car. 2. Cap. 7. §. 6. & 22 Car. 2. Cap. 26. §. 11. that Prohibited Importation from America, unless in English Ships to unlade, &c. and the Suit in Admiralty is for forfeiture of the Ship landed in Ireland, and the Suit to be in the Court of the High Admiral, is intended in England, and not in the Admiralty of the Plantations or place of Landing, and this hath been constant practice; but per Curiam it was never intended the Admiralty should take cognizance of things triable here, & adjornatur. 651. pl. 3.

Earl of Shaftsbury *and* Lord Digby. Ante.

(68) Slander.

SErjeant Pemberton pray'd Judgment, this being a general Law shall not be avoided by every omission, though by misrecital of date, or adding discord of Knights, &c. more than is in the Act may avoid it; but here the omission is not material, there being sufficient to make the Case without it; and so had the recital been only de Comitibus, the Plaintiff being such, it were not material to recite Dukes, &c. Pl. Com. 105. & Dyer 103. pl. Fulmerstons Case, and the Plaintiff is not within any Clause of the great Officers, so recital of that is but surplusage, as 21 Jac. Cap. 16. of Limitations, its sufficient to recite the particular Action to which its pleaded, this being as several Acts of Parliament as to each. But per Twisden Just. this was in a Bar, but we are in a Count, yet so was Boomer against Freer, infra on 13 Ed. 1. Stat. 2. Cap. 2. adding of burning Houses in Act. sur Stat. for want of fresh Suit on Robbery,

was held not material, there being no queſtion upon the burning, and the recital here is not intended preciſe, but that Inter alia Enactitatum eſt, 3 Cr. 186. Farrer and Eaſt: Hutt. 56. Parkers Caſe, miſrecital of Preamble will not hurt as Indicare for Indictare, 1 Cr. 135. Lord Sayes Caſe, is miſrecited for diſcordia on this Statute was held immaterial, and ſo Dyer 168. pl. Poyntells Caſe of an omiſſion not material, as ſi convictus vel attinct' fuit in Action ſur Stat. for Suit in the Admiralty, Serjeant Stroud for the Defendant, As the Statute is recited, no Earl, Duke, &c. were within this Statute, unleſs alſo a Great Officer, ſo this recital alters the very nature of the Statute, and the ſenſe of it, in which Caſe an omiſſion is as fatal as an addition; and on 5 Eliz. Cap. 9. in 2 Cr. 133. Parkers Caſe admitteret for amitteret was held a miſrecital, though the chief word on which the Action lay was forisfacerit, & Dyer 324. pl. 33. on 23 H. 6. Cap. 10. ſaying any de ſes Officers, for any D'es Officers, though as to the Sheriff this was well without, yet being ill as to the Officers its void wholly; ſo here though it might have been well enough to recite only Dukes, Earls, &c. yet by putting in other Officers it vitiates the whole, and the Inter alia refers to other Statutes of the ſame Seſſion, being Item, and this recital in the declaration ſuppoſeth the words being magnis Officiariis, which is more than is in the Statute. Twiſd. Juſt. in 6 Car. 1. ruled that Concluſion contra formam Stat' in hujuſmodi caſu Edit' had aided, but on contra formam Stat' prædict', miſrecited, is fatal to declaration, which the Court agreed. And 2. omiſſion as well as addition, makes fatal miſrecital. But adjornatur.

Tomkins *and* Pool. Ante.

(69) Treſpaſs. IN Treſpaſs it was excepted in Arreſt of Judgment, that in Diſtringas the Niſi prius & Jurata is Lunæ in menſem Paſch' Ret' which per Serjeant Pemberton cannot be moved in Arreſt of Judgment, no more than want of Warrant of Attorny, which is no parcel of the Record it ſelf, &c. though the Jurata were ſo alſo, yet this is aided by 16 & 17 Car. 2. Cap. 8. and the Return of the Diſtringas is good enough, but the Jurata and the Ni. prius mentioned therein is nihi Lunæ in menſem Paſch' &c. and its at the Judges pleaſure to ſet what day he will, but the Court inclined ſtrongly its ill, & adjornatur.

Jevan

Jevan *and* Love, Ante. *Monday*, May 8.

ON two Writs Teste the same day, and a Sequestration the same day, the Plaintiffs was as an Elegit' Fi' Fac' de bonis Eccles' per Rationabile Extent, and of moity of Lands one Brown had, the other to levy so much money de bonis Ecclesiasticis, and the money being brought into Court, Brown excepted that the Plaintiffs Writ is void, sed per Curiam its only erroneous and not void as to a stranger: 2. Though one were as Elegit of Lands and Goods, and the other of Money, yet Elegit as to Goods is but a Fieri Facias; & per Curiam, the money was divided equally, not according to proportion of debts, and to this the parties agreed. (70) Execution.

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Termino Trinitat.

28 *Car.* II. in *B. R.* Anno 1676.

Friday, May 26.

Rainsford Ch. J. & *Wild.*
Twisden. & *Jones.*

Wood *and* Withers. Ante. 646. pl. 65.

(1) Trespass.

TRespass de tres bovil' Angl' Bullocks, Dolbyn excepted in Arrest of Judgment that Juvencus is a proper word, as de 4 Pictas Pellices Angliæ Skins, Yelverton 68. Gardner, &c. sed non allocatur; but the English is void, or being Bovil' with a dash short, its intendable any way, and Judgment for the Plaintiff.

Michell *against* Allestry, *&c. Saturday*, May 27.

(2) Ways.

SImson excepted in Arrest of Judgment, in Act. upon the Case for bringing Horses wild to tame in little Lincoln-fields, being an open publick place where people are all the day passing and repassing, because its not said to be any High-way, nor said that the Defendant knew them to be wild, nor was there negligence in the Coachman, who was thrown out and hurt; but by Saunders an Action upon the Case well lay, as by Smith

Smith of Westminster, for not pinning an Ox, but setting a Dog on him, whereby he ran into Pallas-yard and hurt him; so where a Monky escaped and did hurt, by Default of the owner; & per Curiam, its at peril of the owner to take strength enough to order them, and the Master is as lyable as the Servant if he gave order for it, and the Action is generally for bringing them thither, which is intended personal, and Judgment for the Plaintiff.

Dominus Rex and Pidgeon. Ante. 647. pl. 67.

(3) Admiral.

MR. Solicitor excepted against Prohibition to Admiral on Ship coming from Virginia, 22 & 23 Car. 2. Cap. 26. §. 13. & 12 Car. 2. Cap. 18. §. and putting into Ireland by stress of weather, because the Ship and Furniture is to be forfeited, moity to the King, and moity to the Informer that sueth in Plantations, or in Court of Record, because in some Plantations there is no Admiralty, and the High Admiral here hath no Jurisdiction, and this would evade the Act, for none will go back to the Plantations after forfeiture; & adjornatur, the Court inclining to this.

Dominus Rex and Brown.

(4) Perjury.

HOlt excepted to an Indictment of Perjury on Affidavit that it was his Freehold in a foreign County, because this is matter of title; And per Curiam no Indictment lyeth nor for a Wager of Law, nor for Answer in Chancery, saying its all false, nor for an Affidavit on a foreign Plea in Inferior Court, and it was quasht, Rainsf. C. J. & Jones absent.

Brown *and* Wait.

(5) Treason.

TRespass on Lease of Mannor of Dancy, on Devise of Dancy, Special Verdict find Lord Danby seised 4 Car. 1. who Covenanted to stand seised to several uses, determined the Remainder to Sir John Danvers in Tail, and after 1646 levied a Fine with power to make Leases, that Sir John Danvers died seised and the Lessor of the Plaintiff is his Son and Heir, and that by vertue of 13 Car. 2 Cap. 15. §. 2. the King was seised and gave to the Duke of York, who assigned to the Defendant; and Levins for the Plaintiff, the power to make Leases cannot be now in Question whether forfeit or not, because the King hath made no Lease: And 1. this Act gives no forfeiture of any Estate Tail, Rights, Interests, and

and Conditions not affecting this Case, Sir John Danvers being in actual possession, in which case Lands, Tenements, and Hereditaments are as large in extent as Interests and Rights; and on 25 Ed. 3. Stat. Cap. Escheat of Lands and Tenements to be to the King, his Heirs and Successors, yet until 26 H. 8. Cap. 13. none ever forfeited Estate Tail for Treason, so 13 R. 2. Cap. 2. Stat. 2. and also 27 Ed. 3. Cap. 1. & 16 R. 2. Cap. 5. of Premunire, and also 27 Ed. 3. Stat. Cap. 5. of forestalling Wines, all which have as large words as the Case in Question, yet in 1 Inst. 130. Trudgeons Case, 11 Co. 63. b it was adjudged Lands in Tail are not forfeited, Forfeit. Br. 101 and 1 Inst. 393 Tail was forfeitable until 26 H. 8. Cap. and here is no Attainder of Sir John Danvers, as there was in the Case of Premunire, in which Case until 1 Eliz. Cap. 5. §. any man might kill them, but there is only pains and penalties given on the Estate; and on 26 Hen. Eight, Cap. 13. Sect. 34. its any Estate of Inheritance whatsoever, which was the first words that included Estates Tail. And 33 H. 8. Cap. 20. adds Rights and Conditions, and vests all in the King without office, but enlargeth not the Estates, 5 Ed 6. 11. §. 5. Pl. Com. 481. upon Attainder of Lord Lovel, 1 H. 7. his Estate Tail was specially mentioned, and the Parliament did intend degrees of punishment in those that were Regicides, some whereof were attainted, and some not; and the Defendant was not 2. in by the Fine of Sir J. Danvers after 25 March 1646, to the use of himself in Tail, this lets in no forfeiture, nor is not like the Case of a Fine by issue in Tail of Lands charged, because there the Land was charged, and only avoidable by W. 2. Cap. 1. but if here had been an Attainder it had been as a Warranty or Charge precedent to this new Estate, but this forfeiture is given after de novo, and alters not the discent or blood of the Issue, but is as a subsequent gift by the Parliament which can carry neither of the Estates Tail, and the Instantanious intended Fee was only in supposition of Law, which was not regarded by Parliament, no more than the Common-Law, 1 Inst. 31. and therefore Dower shall not be of seisin of an Instant 3 H. 7. 6. a & 2 Cr. 615. on Feoffee for anothers life by Tenant for life, or on Feoffment by Tenant in Special Tail. Sir J. King for the Defendant, that Tail may be forfeited by general words by the same rule that it was so created, by W. 2. Cap. 1. and the general words of 13 Car. 2. Cap. 15. do as well include Tail as the word Alienations in W. 2. Cap. 1. Also 26 H. 8. Cap. 13. §. 4. hath only general words; and in 13 Car. 2. Cap. 15.

all

all Interests and Hereditaments are words that include the forfeiture of Estates Tail, Estate and Interest being of the same import, and this must be intended of Fee, because there are particular words as to Chattels, and the word Hereditaments of what nature soever, is as much as to say any Estate of Inheritance whatsoever, and it appears the Act intended to forfeit an Estate Tail, §. calling them persons attainted, and this hath the same words, as 12 Car. 2. Cap. 30. §. 2. which doth forfeit Estates Tail by Attainder, and there is no other saving, Pl. Com. 234. the most beneficial construction for the forfeiture shall be for the King, and without this many Clauses would be idle, as §. 2. that forfeits the Lands, and §. notice is taken of the death of Sir J. Danvers, which differenceth this from Trudgeons Case, where there might be some benefit during the life of the offender; also the Statutes of Premunire are not so comprehensive as this which is not only a gift of all Hereditaments, but 2 Roll. 503. of all Lands, Tenements, and other (4 Co. Adams and Lamberts Case) Hereditaments whatsoever, which is intended of all other Estates in the Mannors, Lands, Tenements, &c. before given: 2. Though the Tail be not forfeited, yet the Fine in 23 Car. 1. doth let in the forfeiture, as 1 Co. 48. of a Rent, and Poph. 132. of a Statute Conus per Tenant in Tail for a forfeiture, is an Alienation, and this may be made good by a Fine; and a forfeiture is called an Alienation in Pl. Com. 260. and so restrained by W. 2. Cap. 1. therefore is as well vested as if it had been before 25 March 1646, whither the forfeiture relate as an office to an Attainder to put the King in actual possession, in which Case 3 Ed. 4. 25. the King is let in by the Fine as well as to avoid a Remitter, for if the Kings Tenant attainted of felony, levy a Fine, the whole Estate is forfeited, 1 Inst. 52. b and if the forfeiture relate only to the crime committed, yet it will subject the Estate, Pl. Com. 488. & 1 Inst. 390. to avoid Mesne Incumbrances or Acts, as on 26 H. Cap. if Tenant in Tail be attaint, Dyer Austen's Case, the Tail may be said determined, or not as in Co. Doutyes Case, for the Kings advantage. 3. Also the Estate of the Conusee of the Fine is forfeited within 13 Car. 2. Cap. 15. §. 2. Deux being seised in Fee-simple to the use of Sir J. Danvers in Tail; and Moor. 196. pl. Pyms Case agree the like, though this were but an Instantanious possession, and for the benefit of another, as in Hob. Sheffields Case, and 1 Cr. Newmans Case, and 1 Co. Sir Francis Englefields Case, the use of the Fee being for benefit of Sir J. D. Twisden said its

plain, had he been attainted he should forfeit; and here the Statute takes notice he was guilty of Treason; and by Wild Justice, a member of that Parliament, all the favour of the Parliament was as to the life of the offender, not as to his Estate; but per Curiam this Fine will never let in any forfeiture, unless the Estate Tail be forfeited by the general words: 2. The Instantanious possession cannot be forfeited. Also the Treason relates only to 1648, and the Fine was precedent, and its only the penalty that relates to time precedent. But adjornatur.

Dominus Rex and Chenan. Tuesday, *May* 30.

(6) Leather. IN Indictment on 1 Jac. 22. §. 28. for making Shoos of upper Calves-skin-leather not dyed nor tanned as Spanish Leather: Symson excepted in Arrest of Judgment, that the offence in the Statute is to make them of Leather not tanned like Spanish Leather, sed non allocatur, for this must be as well dyed like Spanish Leather as well as tanned, for tanned Leather as this was costs but 50 s. a Skin, and those tanned costs 7 l. which is a great Cheat: 2. These are not averred to be made of English Leather, but only that the Shoos were of Calves-skin, contra formam Statuti; but per Curiam, this is well enough after Verdict, as Commissioners are intended Englishmen in an Act of Parliament, and this is not an offence on the first by Wild Justice, but on Calves-leather excepted, and this is a general Law which Jones Justice agreed; contra per Twisden, and the Court against Wild inclined it must be averred English-Leather. Adjornatur.

Aynsworth *and* Chamberlain.

(7) Amendment. IN Covenant (on 16 & 17 Car. 2. Cap. 8.) Bugby prayed to have Judgment on and Winters Case, that the Issue is local in Lancashire a County Palatine, and therefore not to be tried; but in London where the Action is laid for rent of Mines, the Defendant pleading an Inclosure of the Lands in Bar, per quod he could not enjoy the Mines, and to this Jones and Raynsford inclined strongly, but by Jones, Wise and Adderlyes Case was ruled in C. B. to be good, because the Statute was intended and made to aid the right if tried where laid; but Twisden and Wild contra, that the Statute was never intended to take away foreign Pleas that could not be tried in any other County but only

of

of wrong Alſns in the ſame County, as 2 Cr. 43. & adjornatur.

Dominus Rex and Stiff.

(8) Trades.

SErjeant Crook excepted in Arreſt of Judgment on Indictment of uſing the Trade of a Baker, not ſaying a common Baker, ſed non allocatur, for this muſt be ſo intended after Verdict. 2. The offence is for a eleven Months from November 30. 26 Car. 2. and the Bill is taken September 30. 27 Car. 2. which is not eleven Kalender nor Lunar Months, ſo the Verdict is impoſſible, being for the whole value culpabilis generally; & per Curiam this is ill, and Judgment ſtay'd.

Tomkins *and* Porby. Ante. *Wedneſday*, May 31.

(9) Amendment.

LEvins prayed Judgment the Return being right, the Dies Datus for trying the Cauſe at Niſi Prius being no formal day of Law, its ſufficient if parties have notice ſufficient, as it appears by the Trial they had, as out of Ireland, the not ſaying at the day and hour of Niſi Prius: 2. This in Menſem Paſch. is aided by 18 Eliz. Cap. 14. or by 16 & 17 Car. 2. Cap. 8. the Clerk having ſufficient Inſtruction to make it Poſt Menſem Paſch. and in Ford and Ryders Caſe Cr. Saunders for the Defendant here appears to be no Verdict at all, that the Court can take notice of as if Niſi Prius had been Febr. 30. this is not capable of, averment, and in Menſe Paſch. might be applied as well before Menſem Paſch. as after, & tres Paſch. is as well as in Menſem, and the Jurata is no Proceſs, and the fault is not only in the Jurata but alſo in the Niſi prius, & per curiam its ill, and is not amendable by the Paper of Niſi Prius ſet up in Office by the Chief Juſtice, being no record, but parties agreed paying coſts to try at Bar.

Saunders *againſt* Court. Ante.

(10) Legacy.

DEnham ſhewed cauſe againſt diſcharge of Rule for Prohibition in Suit for a Legacy againſt Adminiſtrator of Executor during Minority: 1. Becauſe they are not ſuable, but the Adminiſtrator de bonis non, and ſo is Winch. 64. pl. And 2. becauſe Oath is made of refuſal of the Plea that the Adminiſtrator of Executor had no aſſets, the Court conceived the Suit againſt Adminiſtrator de bonis non

well enough; but adjornatur as to the refusal of the Plea, for as to that Prohibition must go, &c.

Gold *and* Cutler.

(11) Sheriff.

IN debt on obligation to appear immediate; the Defendant on Oyer pleaded the Stat. 23 H. 6. Cap. 10. and that the Writ on which he was taken was an Attachment Ret' tres Mich. in Chancery, on order of money (not said to pay) to the Plaintiff, and that this was for ease, & alia forma: The Plaintiff replieth there was another Writ returned immediate, as Kingwell and Bennet, and that the Defendant was in custody by vertue thereof, absque hoc that the Defendant was in custody by vertue of the Writ Ret' tres Mich. to which the Defendant demurred, because this is an ill traverse, which the Court agreed, except Wild: But by all being immaterial and no special demurrer, its well enough, and the Defendant might have rejoyned that he was Arrested upon that Writ modo & forma, for whither the Defendant were taken by one, or the other, he could not be taken upon both, and therefore Issue may be on either: and Judgment for the Plaintiff.

Plummer *and* Whitchcot. Ante. *Thursday*, June 1.

(12) Escape.

DEbt for 2001 l. on Recovery against Holt committed to the Marshalsea thereon, and turn'd over from Chancery to the Fleet, to Duckingfield Lessee of the Defendant, seised in fee, and that Duckingfield was insufficient, but gave Security, and was by Rule of C. B. allow'd under a 1000 l. Annual Rent; Levins for the Plaintiff admitted debt lay not against the Goaler at Common Law, 2 Inst. 382. on W. 2. Cap. 11. yet Action upon the Case did lye in such Case as this, and the Statutes only give new remedy, 2 Inst. 175. & 476. & 44 Ed. 3. 13. a County answer for Coroner, and 11 H. 6. 52. Tenents for Bedle, and so of all other Eligible Offices at Common Law, as Sheriff, &c. Dyer 238. Collector of Customs shall answer for Deputy that hath a fixt Estate under him: 2. As to the Statute-Law it is expresst in 51 H. 3. pag. 11. de Scaccario, §. 8. that the Constable, Marshal, &c. shall answer for Deputy, but gives not debt, and W. 2. Cap. 11. is only as to matters of account, and 1 R. 2. Cap. 12. gives debt and forfeiture of Office on Escape, 7 H. 4. Cap. 4. disallows Protections to such, only to persons in Execution gives not debt, 2 H. 6. Cap. 10. is

10. is that all Clerks shall appoint Deputies, for which they will answer, but gives not debt: And though all these be to be considered, yet the Gist of this Action is on W. 2. Cap. 11. and its not strange that old Statute an that Enacts one particular should be as an instance for all of like nature, as de Circumspecte agatis 13 Ed. 1. Stat. 4. pag. which mentions only Norwich, yet extends to all the Bishops in England; so 52 H. 3. Cap. 9. of contra formam Feoffamenti, includes a Confirmation, and lyeth as well for Rent as Suit, &c. so 32 H. 8. Cap. of Discents, taking away Entry on Disseisins with force, yet it extends unto all Disseisins 13 Co. 6. as well as with force, and though the Law be particular the reason is general: 2. As the Law then stood no Capias lay against any but in Trespass vi & armis, 3 Co. and this Statute W. 2. Cap. 11. gave Capias in account only, because at this time none can be said to be imprisoned until 25 Ed. 3. Stat. Cap. 17. for any other cause, and this gives not debt but a Capias in it: 3. The Authorities between W. 2. Cap. 11. and 1 R. 2. Cap. 12. are damages, Fitzh. 81. Debt against Goaler on Escape of one committed on Stat. Merchant, and 41 Ass. 15. Escape. Br. 48. Debt on Judgment in Trespass, and Debt in 45 Ed. 3. 1. was abated only because against a Prior. Dative, that should be against the Abbey, Pl. Com. 37. a rests upon this Statute, 2 Inst. 382. against the Warden of the Fleet, and against the Marshal, and other Officers, and there is as much reason to extend W. 2. Cap. 11. to other causes of Action, as 1 R. 2. Cap. 12. against other Officers. 4. The Defendant is a superior, and hath not lost his Office by the others being Sub-officer, as he in Reversion is Tenant; and in Dyer 278. pl. its ruled the Action lay against the Deputy as Sub-marischallus, and the Superior shall have his forfeiture, and not the King, nor the Court that put in the Superior, and so ruled in Lady Braughtons Case, & 3 Cr. 386. expressly, and the Statute W. 2. Cap. 11. gives no Action against the Deputy that hath not a first Estate, for 9 Co. 48. & 3 Cr. 69. he must act all in his Masters name, and no Action lyeth for or against him, but immediately against the Officer; and this difference appears 2 Roll 155. And 5. he is not charged as an Heir is for his Reversion, but for his breach of trust in disposing it to one not answerable, which he should execute himself. And 6. he that doth Concedere doth Committere and more. 7. The Rule in C. B. is on the Defendants own suggestion and information, and at the peril only of the Officer who was to answer for him;

him; and Noy 69. is immediately against D. and Ch. and not said that the Baily of the Liberty was insufficient, in which Case (4 Inst. 114.) its said it will lye, and the Officer is privy, and may provide for his own security, but the Creditors cannot provide for theirs, and therefore this is the greater inconvenience, Fleta Lib. 2. Cap. 4. the Marshal may commit to Deputy, and shall be amerced for his Default, non ut Comes, but as Serviens, 39 H. 6. 32. its admitted by all in Esch. Ch. that the D. of N. was responsible, 12 Ed. 4. Rot. Parliament. membr. 5 D. of N. procured a Pardon of Escapes for the Importable Charges that thereon might fall upon the Duke of Norfolk, and 9 Co. 90. a in Sir G. Reynells Case, and 2 Inst. 382. Mayor of London answer for Sheriffs; and the Case at Bar is much stronger, it appearing here is a Rent of 1000 l. reserved, and security taken against Escapes, which shews it was taken by himself and that he was chargeable. Finch for the Defendant, this Case doth not depend on 51 H. 3. pag. 11. nor on 1 H. 6. Cap. 10. nor on W. 2. Cap. 11. nor on 1 R. 2. Cap. 12. which have not enlarged the remedy, but only altered the Action upon the Case into an Action of Debt, and if the Defendant be no Superior at Common Law this Action will not lye against him, 4 Inst. 114. Respondeat superior is only where the inferior Officer is removable, as Goaler to the Sheriff or Baily to the Tenants that chuse him, who is but a servant. And admitting, Noy 69. to have laid every injury to Justice must be answered by the Lord, 20 Ed. 4. 5. and the Baily is but his servant, 39 H. 6. 32. F.N.B. 164. 4 Inst. 267. and removable for Insufficiency which is not parallel with this Case in question; but the Duke of Norfolk who thought he was responsible, thought also that his Deputy was removable. 3. There is no reason to construe the Defendant a superior, the Reversioner is none, the dependance and consequence of Law being the same: As if the King had granted to D. for life, and after to the Defendant in fee, and the taking advantage of forfeiture is not by any superiority, but by consequence of Law. 4. Here is no Attornment by the Deputy, 1 Inst. 312. nor no dependance as in Case of a Tenant, and this is no Rent but Security for a Collateral summ, but if it were, this alters not the Law: Because 5. he hath done no more than he ought, and there is no default in him, so is no debtor ex malificio, and he must be charged in respect of Reversion, or not at all, for the breach of trust might as well be objected on assignment in fee. And 6. there is no inconvenience in this, now every Prisoner being to

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be taken without new process, so there is not the same necessity now as heretofore that Respondeat superior, and yet then the Duke of N. was forced to procure a particular Statute. Twisden Justice, had this been in an account, the superior of him that is Custos Goalæ must answer which had been in vain if there were no superior, and in 39 H. 6. Rot. 34. Bowchier was sworn, and so the Office forfeited. Wild Justice said it was never intended on W. 2. Cap. 11. that superior should answer in any other case than account. Et Adjornatur.

Clinch *and* Butler.

(13) Heir.

DEbt on Obligation, and upon riens per discent, Special Verdict find Milborn seised in fee, de saliva Angl. a Salt Pan, dyed and his Son entred and was seised; and the Defendant entred as Heir by possessio fratris, and if this be Assets per discent for the Plaintiff; & per Curiam, H. 2. Car. 1. Rot. 2445. it was adjudged such Heir by possessio fratris was chargeable to debt of Ancestor, and so per Curiam the Defendant here. And Judgment for the Plaintiff.

Mathews *and* Readman.

(14) Assumpsit.

SAnders prayed Judgment in Assumpsit to pay what the Plaintiff is damnified by not repairing a House which the Defendant reparare debuit, not said how, which is a sufficient consideration. Sed adjornatur.

Ellis *and* Nelson. Ante.

(15) Sheriffs.

DEbt on Obligation by one Rudle, the Defendant pleads that the Plaintiff is Bailiff of the Savoy, which is an Office in Fee, and the agreement corrupt; the Plaintiff replieth that the King was seised in Fee, and deputed Ellis for 30 Years, who for Rent reserved, substituted the Defendant, and if this were within 5 & 6 Ed. 6. Cap. 16. was the question. Holt for the Defendant, the King being seised of liberty of the Savoy may make a grant in Fee, as parcel of Dutchy of Lancaster, which is within the Proviso; but a Bailiff is distinct from the liberty of Ret. Brevium, and cannot be farmed. Pemberton the Kings Serjeant for the Plaintiff, What they cannot execute themselves they must execute by Deputy; and the Bailiff of a Franchis is no more, and was

was never intended within 5 & 6 Ed. 6. Cap. 16. or if it be its excepted by the Proviso §. 4. and the Franchis it self being in Fee, priviledge doth protect all Inferior Grants, as Marshall may grant Submarshall, &c. for Precepts. Twisden, The accounting for the Profits will be no selling within the Statute; and the making a reservation is no more, and the King may grant this Office of Bailiff, though he cannot exercise: and there is 40 l. per Annum reserved by the King, and the Bailiffwick of Southwark is granted for Money 1500 l. paid by the present possessor: And the Bailiffwick of Westminster is sold reserving Rent, &c. & per Curiam Judgment for the Plaintiff, Nisi.

Boomer *and* Freer. *Hill.* 1649. Rot. 503.

(16) Fresh suit.

THE Roll was brought into the Court on Action upon the Case, on 13 Ed. 1. Stat. 2. Cap. 2. of Hue and Cry recyting, whereas Felonies, Roberies and Burning of Houses; it was excepted in arrest of Judgment, that the Statute was only Arsons generally, and not Arsons des mesons, and so the Parliament Roll which was brought into the Court appeared to be, but the Print is Burning of Houses. Wild said he had seen the Roll, &c.

Wortly *and* Watkinson. Ante.

(17) Marriage.

SIR John King praied Consultation in suit for marriage of his Wives Sisters daughter, and Trin. 2 Jac. Rot. 1032. in Parsons Case there was a Prohibition Nisi, but in Hill. two Year after on debate a Consultation was awarded, and therefore by Order of the King and Counsel, the Case was expunged out of 1 Inst. and there is the same reason in Case of the Woman 18 Levit. 14. as of the Man, and 2 Inst. on 32 H. 8. Cap. §. is so, and Moor. 907. pl. and 3 Cr. 228. Mans Case, there was a Consultation, Hill. 11 Car. 1. Allen and Wats Case, the like and Hob. 832. 1. Because these degrees 1563 are prohibited by the Canons, and so in 1571, and 1603, in all which tables these degrees have been published as prohibited, and the reason is the same with Hill and Good in C. B. on Marriage of Wives Sister, where on demurrer to prohibition, and debate, it was held within the Levitical degrees, albeit not mentioned, and in Pari Gradu is all one with degree expressly prohibited

prohibited. Twisden Justice said in Sir Giles Allingtons Case, it was said that the Uncle may Marry his Neece, because he continues the same Superiority; but the Nephew cannot Marry the Aunt, because he would gain Superiority. But by Wild Justice in Harrison and Gould on Marriage of Great Uncles Wife a Consultation was denied by great advise certified. Jones Justice said he argued Hill and Goods Case, in C. B. and that was only of the Wives Sister, but no farther. Weston for the Plaintiff in the Prohibition, that the Wives Sister's daughter is not within the Rule of the Wives Sister, and 32 H. 8. Cap. 38. §. 2. all Marriages not Prohibited by Gods Law are held good, and the Ecclesiastical Canons cannot enlarge the Law, 2 Inst. leaves out this degree; and in Parsons Case there was only a Rule in the Docket for a Consultation, but no Consultation actually sued forth; and the suit here was before H. Commissioners in Causa Incestus, not as to the Matrimony; and here being after Issue had and in Collateral degrees, Bogason having Issue Ann and Alice Married to Wortly, and dieth without Issue; then Wortly Married the daughter of Ann, who Married Stephenson; which shall not be enlarged, being out of the express degrees; & per Curiam Prohibition. And had not 2 Ed. 6. Cap. 23. and 1 Eliz. 1. §. 11. Repealed the Clause of 32 H. 8. Cap. 8. §. 2. as to Issue had, this had been a clear case.

Earl of Shaftesbury *and* Digby. Ante.

Saturday, June 3.

RAinsford Chief Justice delivered the opinion of the Court, that the Plaintiff ought to have his Judgment; and that Contrafaciendum is a legal word used for counterfeiting Money Deeds or Evidence, therefore properly enough here, as Rast. Entr. 593. and Trin. 20. Eliz. Rot. 28. Lord Cromwells Case, this word is used on this occasion upon the same Statute, but if it had been on demurrer it had been otherwise; but being after Verdict the Court in duty must support it as much as may be, and Leave the Defendant to his Writ of Error. 2. The Plaintiff brings this action as an Earl, and hath recited as much as is sufficient for an Earl, and so had vel de aliis been omitted wholly, it would not have been material, nor is it here; but had any other person no Peer, nor named in the Act, brought such an action as a great Officer, the Amission of vel de aliis might arrest Judg- (11) Slander.

ment, because he could not otherwise be brought within the Act, and the Court herein relied on Borner and Freers Case, 1649 Supra which was Incendia, and though recited in the Record as in the Print Incendia Domorum, yet on Copy of the Record in the Tower attested, the Court gave Judgment for the Plaintiff, being action upon the Statute of 13 Ed. 1. St. 2. Cap. 2. for a Robery, and all necessary Circumstances thereto alledged, from which the Court now could not vary without setting that aside; and it was had on long debate, Pl. Com. 62. 65. only three Branches of 23 H. 6. Cap. & per Curiam, each clause was as a several Act of Parliament, and none need plead more than belongs to his Case. 3. The conclusion Contra form. Stat. Prædict. is well, being a particular Statute as to the Plaintiff who is an Earl, had all the rest been omitted: Also the conclusion is prout inter alia plenius apparet, which makes it clear the Plaintiff intended not to recite the whole Statute; in Queen Elizabeths time they were more strictly held to recitals than of latter time. and the Court chose the later Course. And Judgment for the Plaintiff.

Stork *and* Cullen. *Mich.* 27 *Car.* II. Rot. 595.

(19) Admiral.

DEbt on Obligation that Laurence Pelman perform all Orders and Decrees of Admiralty on suit there by the Plaintiff against the Ship, where the value was adjudged; and the Defendant pleads that Coleman appealed to the Constable of Dover, and the Judgment was Reverst; and the Defendant to pay costs; and after this the Defendant sued appeal to the Duke of York Lord Warden of the Cinque Ports, who deputed Dr. Wiseman as Delegate who Reverst the first decree; to which the Defendant demurred: And by Finch for the Plaintiff no appeal lieth to the Lord Warden of the Cinque Ports, he being as such admiral there Custos Maris, 1 Inst. and Spelman verbo Admiral being the ancient name, untill Ed. 1. and the first Admiral was 4 Inst. 142. Mare Clausum 2 Cap. 16. in Rich. 2. time united, and the Cinque Ports 2 Inst. 557. on 28 Ed. 1. Cap. 7. 25 H. 8. Cap. 19. reteined their ancient Jurisdiction as part, &c. 8 Eliz. Cap. 5. and no admiral ever had this power of appeal, 4 Inst. 143. though they had all other Jurisdictions: Also the sentence in the Cinque Ports is but as deputy to the Lord Warden and his acts; and therefore no appeal, 4 Inst. 147. being all one Jurisdiction, and no Superior to which only an appeal

an Appeal lieth, and there is no Statute that hath altered the Law. Error in Shepey being given 2 Inst. 557. of Process at Common-Law, and 9 H. 3. Cap. 9. gives no new Jurisdiction, and 24 H. 8. Cap. 12. and 25 H. 8. Cap. 19. mention no such Jurisdiction, therefore no Appeal lieth. But 2. if it did, its not here well executed by Delegates, which 4 Inst. 339. are only by the Kings Commission under the Great Seal which in it self also is but a Delegate Power, and therefore Bract. 3. Cap. 2. fol. 118. cannot make a deputy being a Judicial Office; so the first sentence is yet in force. But 3. however this Bond is forfeited, being not to perform the sentence, but to perform all orders and decrees which are not suspended by Appeal; especially being in the case of a Stranger, who shall not be aided by relation. Sanders for the Defendant, the Condition is to perform decrees of admiralty finally made which being suspended by the appeal, the Defendant is not obliged to pay, there being no Cesser of suit in Civil Law, as there is at Common-law; but the Appeal nulls the sentence which is taken notice of 2 R. 2. Quare Impedit 143. and Co. Packmans Case 3 Bulstr. 72. Baron & Feme continue so untill an Appeal be determined, and the Bishop was held to continue Bishop, and his Lease good; albeit deprived until appeal reversed, and this Bond is the form of Bail in all Cases where a Ship is bailed, as here, therefore it would be hard for Bail to pay the Money, when the Principal is discharged by Reversal of the Sentence. 2. Its layed that the Duke of York had full power to receive Appeals as Lord Warden, which is not Traversable, but to be determined by the Court who take notice of the Admirals Jurisdiction, and if he have power to receive an Appeal its no matter whether his Delegacy be good or not, for still an Appeal is depending untill determination be, and there could in this case no appeal be immediate to the King, but it hath been confirmed by the King and Counsel. Wild Justice prima facie, its strong against the Defendant; and by Twisden its a strange Appeal from the Lord Warden to the Lord Warden, and our Law must determin whether delegacy be good or not, and if an Appeal cannot be granted, there is none at all: So adjornatur for the Defendant to produce Precedents, else its very strong against the Defendant.

Cockman *and* Samson. *Pasch.* 28 *Car.* II.

(20) Assumpsit.

ASsumpsit in consideration the Plaintiff expectaret Debit. the Defendant a Stranger promised to pay: to which the Plaintiff demurred, & per Curiam, this is a good consideration to forbear the debt; but if it were on forbearance of the Defendant, the Plaintiff must shew how the Defendant was liable to pay the debt: and Judgment for the Plaintiff. But 2. being that a Stranger that is dead was indebted to the Plaintiff in Quadam summa, not said what, not exceeding 20 s. and there is no request of the Defendant laid, but only licet sæpius, which per Curiam is ill, notice being here requisite. And Judgment for the Defendant.

Cox *and* Mellish.

(21) Payment.

IN Trespass the Defendant pleaded Obligation given to the Plaintiff in satisfaction whereupon the Plaintiff took Issue, which was entred for tryal: And now Holt prayed a Repled. because this will be a Jeofail when tryed, being only an accord, and not executed by satisfaction; sed non allocatur, there being no demurrer nor Verdict, the Court cannot grant Repled. & per Curiam, Tryal to proceed.

Soam *and* Barnardiston. Ante. *Monday*, June 5.

(22) Parliament.

NOta, it was said that on the Error argued by the eight Judges at Sarjeants Inn on Saturday last, Rule was given for Reversal of the Judgment in B. R. by North Chief Justice of C. B. and Windham, and all the Barons of the Exchequer against the opinion of Ellis and Atkins Justices of C. B. and Judgment Reversed accordingly on the point of Law, that no action upon the Case lieth against the Sheriff for a double Return, a special remedy being given by the Statute, and none at Common-Law.

Hipsly

Hipsly *and* Tuck. Ante.

POlyxphen on 3 Eliz. Cap. 10. & 12. §. 2. that Leases be void, and that the Parson be void, yet its Plenarty, and 5 & 6 Ed. 6. Cap. 4 §. 2. conceived that on 25 Car. 2. Cap. 2. that Mayors not taking Oath is not assignable for Error: and Llyod and Best 2 Roll. 761. Judgment before Deputy, Estops to say he was not Deputy, which Wild Justice agreed, but by Rainsford Chief Justice Jones and Twisden who held it Error on 5 & 6. Ed. 6. Cap. 16. §. 5 which provides specially for Acts done by such 1 Eliz. 1. §. 23. Roll. 761. but Verdict being 100 l. for saying he pickt his Pocket Adjorna. (23) Error.

Swayn *and* Fawkner. *Thursday*, June 6.

IN Assumpsit changed from London to Rutlandshire, on consideration of 80 l. Joynture, the Defendant promised to pay 700 more to the Plaintiff, than he could have with any other Wife, and double his practice, which is an agreement under Seal in the County removed into Middlsex, because the Plaintiff was a Barrester, on Bacons Case, and Proctors Case: which by Twisden is but of favour, and not to be stretcht, and the Tryal was sent into the Country, Nisi. (24) Visne.

Syms *and* Collier.

ON Appeal after Excommengment, for not delivery of the Copy of a Libel, the Defendant below Plaintiff in the Appeal, praied Prohibition upon the delivery of the Copy of the Libel, which the Superior Court, Dr. Wiseman delivered, but will not absolve the party of his Excommunication, but proceeded thereon for costs after Appeal to the Delegates by the Defendant; and if these were on sentence on the merits of the Cause, the Court said they would not grant any Prohibition, but left the Defendant to his Cautione admittenda; but this being a Collusion in the party, the Court granted Prohibition to the parties, there being nothing before the Delegates, &c. (25) Excomengement.

Brag

Brag *and* Turnor.

(26) Replevin. ON Judgment by the Defendant in a second deliverance a Return Irreplevisable as to Goods and Cattle, and as to the Cattle a Writ of Enquiry taken out upon 17 Car. 2. Cap. 7. Wine for the Plaintiff praied to know what the damages were, and to pay and have the Cattle: Which Polyxphen opposed, because this is on an Avowry for damage Feasant; and not for Rent and Services: So not within the Statute, but at Common Law, which the Court agreed; and that the damages are here grounded on 7 H. 8. Cap. 4. therefore the Avowant must take what is found, and not detain the Cattle, 21 H. 8. Cap. 19. §. 3. else is Trespasser, &c. and the Court inclined strongly that a second deliverance is within 17 Car. 2. Cap. 7. to enquire. Adjornatur.

Lunn *against* Soles. *Wednesday*, June 7.

(27) Abatement. IN debt on Obligation to perform award, which was to stay all actions untill such a day, and to pay before such a day. And 2. it was excepting all actions of Title in Essex. How for the Pl', said it doth not appear there were any Actions of Lands in Essex, which must come on the Defendants part to shew, this Exception is but as a saving. 2 Cr. 400. Holt for the Defendant, the submission being of all Controversies, Ita quod, the Award be de Premissis, and it appearing by the Exception there were other actions, the Defendant need not shew them, which the Court agreed, but said that as to the Release all suits untill the day before the submission is well; and the Plaintiff must aver there were no actions depending, & per Curiam, Judgment for the Defendant, Nisi, and the submission is of all actions, Ita quod the award be made (not said de Premissis) which is necessarily implied. Sed Adjornatur.

Dominus Rex and Cheman. Ante.

(28) WIN praied Judgment on Indictment, upon 1 Jac. Cap. 22. §. English Leather being put by way of description and nomination what is wet Curried, distinguishing it from the Leather of other Countries, which are dry Curried, and §. the particular manner of Currying and Dressing is set forth, & per Curiam, it shall be intended English

lish in the Exception, being after a Verdict, finds it contra formam Statuti. And Judgment for the Plaintiff.

Dominus Rex and Holt.

(29) Mandamus.

WEston excepted to the Return by the Mayor and Capital Burgesses of Abington to a Mandamus to restore the Defendant, being by their Charter of King James to chuse a Recorder, and quod sic Electus continuaret durante bene placito of the Mayor and Bugesses, pro tempore existent. or the Majority; that the Defendant was chose 1656, and in 1674 on removal to Reading, the Majority removed him from Abington. 1. There is no power returned to Elect at will, generally; and Recorder is a known Officer. 2. The affirmative clause quod continuaret Durante bene placito; not said & non Diutius is but concurrent, and takes not away the former general power, as Pl. Com. 202. upon 7 Ed. 6. Cap. 1. §. 15. and the Statute 33 H. 8. Cap. 39. §. 18. of words, but per Curiam, this is in case of a Statute, not of a Patent, which is now the question. But by Weston were the power to Elect at Will well Returned, its void, the Recorder being an Officer by vertue of the Patent of the King, albeit the Election be the means of his coming in, and being a Judicial Officer he cannot be made at Will by Patent, unless at the will of the King; which is a Prerogative interest that cannot be transferred to a Corporation, and this is an unusal clause. 3. Were this power good, its not well executed by the Corporation, unless their will to determin his place appear under the Common Seal, 1656 Blagraves Case of Reading returned a power as here, and he had restitution because being not Elected at Will they could not turn him out at Will, and therefore 1660 they returned a power to Elect at Will; for they might have an Election to chuse for life, and there is no cause returned. Sanders for the Plaintiff Medlecot the present Recorder, In case of Prerogative, the grant Durante bene placito is void, if it must be quam diu se bene gesserit, and there needs not (& non diutius) which the Court agreed. 2. Though they might conclude themselves by a choice of the whole Corporation expresly for life, yet the choice by the Major and Principal Burgheses have only power to Elect, and cannot by any express words vary from the interest given to the whole Corporation by the King, nor give greater interest. 3. Though the Corporation Agregate cannot determin their pleasure, but only under the Corporation Seal, as was resolved in Blagraves case: Yet the Mayor and 12. may

may determin their pleasure without any Common Seal, having none: and the Patent is that the Recorder be during the pleasure of the Mayor and 12, &c. during the Will of the Corporation: 15 H. 7. 17. and Roll. 172. Warren and Smith, 2 Co. 54. and 11 Co. 4b. Bag is not said to be turned out under the Common Seal, Dyer 112 Vaux's Case, he was discharged by Parol. Wild and Twisden Justices said they ought to have called him in Prudence, but the Writ being Majori & Capitalibus Burgi. and not Majori Ballivis & Capitalibus, per Curiam it is ill. though the Mayor and Capital Burgesses were parties only that did the wrong. the Power of Election being in the whole Corporation, ought to be executed by the Mayor and Capital Burgesses, as Error of Judgment before the Mayor must be directed to the name of Corporation: and Deighton's case, Recorder of Stratford upon Avon, a removal without cause was held sufficient, being at Will, & per Curiam, they need not call him. 2. He is the Recorder of the whole Corporation. 3. The being Durante bene placito, need not be said & non aliter. Et Adjornatur.

Holmes and Anker, Gn. Bail of Hume.

(47) Bail.

IN Scire facias on Recovery in error upon the Case the Defendant pleads no Capias ſſued against Hume deliverred to the Sheriff: the Plaintiff replies that a Capias ſſued and Returned non est Inventus; but says nothing as to the delivery to the Sheriff; whereupon the Defendant demurs, and Judgment for the Plaintiff, the delivery being intended.

Clod and Legingham.

(48) Copyhold.

POlwhele prayed leave to Imparlance in Error for Service, unless the Copyhold Tenants will give two Years Purchase to Infranchise, which being done, because the Tenants have set up a custom to Lease for 99 Years without Licence, whereby the Copyholders became Infranchised, per Curiam granted, unless he accept what Mr. Lively tat for damages.

Cripe

Crispe *und* Boreman. *Hill.* 27 & 28 *Car.* II. Rot. 442.

IN Covenant to pay 150 l. a year while Ballast Office is above 1000. per Annum, and if under, to pay the Plaintiff the eighth part of the profits: the Defendant pleads that during all the time of the arrear the Office was under 1000 per Annum; to which the Plaintiff demurred, because the Defendant hath not set forth what the Office-fees were, that so the Plaintiff may know for what to sue; which Rainsford and Wild agreed, because he should have pleaded as to so much nil debet, and that the Office was under 1000 l. per Annum, viz. so much, and that he is ready to pay the Plaintiff the eighth part, Contra per Twisden and Jones, the Plaintiff may have resort to the Defendants Books to know the value, and therefore he must bring his action for the eighth part in certain of the profits clear, &c. the Defendant having an Election to pay the one or the other; which is rather an agreement and a proviso than any defeasance. 2. The Covenant was that if it were under 1000 l. per Annum, by reason of Pestilence or other Casualties, &c. the Defendant saith by reason of suits at Law it was under, &c. not said what those suits were: Which by Wild is ill, tam in B. R. as in the Exchequer, sed per Curiam the particulars would make the Record too Prolixe. 3. The Covenant is to pay Quarterly; which by Wild Justice and Rainsford Chief Justice lieth for three Quarters, and this plea cannot be pleaded. Twisden contra that no action lieth untill after the Year. 4. Rainsford Chief Justice said the suits are said in B. R. and Exchequer, not shewing whether in Equity or at Law in the Exchequer which is ill: which Wild agreed, but by Twisden the Traverse may be as general as the Averment, that there were suits. Adjornatur to try, &c. (32) Covenant.

Smith *and* Tracy. Ante.

A Prohibition was praied by Sister of the whole Blood, against the Children of the half Blood in suit for distribution upon 22 & 23. Car. 2. Cap. 10. §. 3. the Civil Law making no distinction of Bloods; and before this Statute the Ordinary at Commmon-Law did distribute according to Ecclesiastical Law, and though 31 Ed. 3. Cap. 11. & 21. H. 8. Cap. 5. by consequence takes away the Ordinaries power, yet this is restored by (33) Marriage.

this last Statute, our Law being silent herein; and in a Formedon Senn may be laid in Brother of the half Blood, so he is in the same degree; for which reason Hob. prayed a Consultation; Olliff and Clay's case, the half Blood being held in equal degree, and there is no Law in this point but the Ecclesiastical Law. Jeofferies for the Prohibition for the Brother Administrator of the whole Blood, against the Defendants Brother and Sister of the half Blood: The Common practice before the last Act was to prefer the whole Blood in Administration; Br. 47. 2 Roll. 303. tit. Prohib. the Judgment of the next of kin is in our Law, and they are all in equal degree to the Father as to Administration, 31 Ed. 3. Devise 9. but not as to a Brother or Sister, &c. and here can be no Equality of degree, no more than if one were attained, &c. The Court agreed that Common-Law shall determin the distribution, as that it be per Capita as our Law, and not per Stirpes as by their Law; but two years ago in C. B. there was a Prohibition denied by Wild Justice, and they are in equal degree. Sed adjornatur.

Cooper *and* Dalwood, *&c.* *Thursday*, June 8.

(34) Taxes. IN Trespass the Defendants Justified as Officers of the Excise, on 12 Car. 2. Cap. 23. §. 17. because they informed A. B. and C. Justices of the Peace; and that the said Justices did make no determination, which per Curiam is ill, being not said that they nor any two of them did not determin it, and it need not come on the other side that two of them did determin. 2. It was for entring house and taking Goods; the Defendant Justified seisure of Goods in the House 14 days, and that after he was in the house by License: & per Curiam the party may lodge in the House, and not only Inventory the Goods on 12 Car. 2. Cap. 23. §. 17. Also 3. it was said that on default of the Justices the Defendant informed D. and E. Sub-Commissioners of the Excise, not said Comen, or at what place, and its Traversable, & per Curiam, they must shew how. Also 4. by Twisden, tunc existent' Sub-Commissioners is not sufficient, unless it be said these were all the Sub-Comonissioners. Contra by Wild, but adjornatur to take Issue one the merits. 681. pl. 3.

The

The Bishop of Carlisle *and* Wells. Ante.

THE Court on Swineborn 172 & 178 concluded this Bond for tuition of a Child, but a voluntary undertaking of the Guardian, and so not within 23 H. 8 Cap. and at Common-Law its good enough, notwithstanding 3 Inst. 144. Judgment for the Plaintiff, Nisi. (35) Obligation.

------ *Friday*, June. 9.

REplevin de Averiis and counted of taking Averia & Catalla, viz. a Cart and Horses. Levins praied Judgment after Verdict, the right being tried, sed non allocatur, that being an ill Writ, not a void Writ, & per Curiam, Judgment staied. (36) Replevin.

Vere *and* Holyoke.

SCire facias against the Defendant as Bail on Judgment before had, not said when: the Defendant pleads that no Capias was Issued against the Principal on the said Judgment; the Plaintiff replied that the 23 October a Capias Issued and was Returned; the Defendant rejoyned that the Judgment was had but on the 3d. of November after; to which the Plaintiff demurred: Et per Curiam, Judgment for the Defendant, this being a Judgment on a Writ of Enquiry, which is at a day certain; but had it been on a general Judgment the Rejoinder had been ill, because that relates to the 23d of October, the first day of the Term, and the Plaintiff may take a new Sc. fa. (37) Bail.

Hudson *and* Malim.

DEbt on Obligation, the Defendant pleads the Statute 16 Car. 2. Cap. 7. §. 3. of Gaming, that he lost at most at three throws 90 l. to the Plaintiff, that at the same time he lost at Cards to A. 30 l. and to B. at Bett 60 l. more; to which the Plaintiff demurres, because it doth not appear that these are parties together or in trust one for another; and the Statute doth only void debts won of one or more that are parties or trusted for each other, as Danvers case, the act was held to extend only to more the security for more then the 100 l. much more not to extend to different Gamesters. Levins for the Defendant, its not material to whom the party becomes indebt- (38) Gaiming.

ed, for the Statute is that the party should not lose more than 100 l. at one time or meeting upon Ticket, which the Court agreed, and that all plaied for on Ticket is void: and Judgment for the Defendant, the Statute being to be extended against play.

Bager *and* Ash.

(39) Obligation.

DEbt against the Defendant Executor of one Joynt Obligor: The Defendant pleaded in abatement that it appears the Obligation was joynt, sed non allocatur, for it appears not that the other sealed, nor that the other survived, in which case the Executor would be discharged. 2. The plea was that Billa Cassetur concludes, and begins Judgment de Billa, but the body of the plea is a general demurrer, which per Curiam is a plain Bar to the declaration; and Judgment is final, here being no plea in abatement, but only the form thereof begins and ends in abatement, but there is no other form of demurrer to declaration; therefor Judgment for the Plaintiff, for in abatement should be Judgment, si ad Billam prædict. Respondere debet for precludi non, &c. is Replication to plea, &c.

The Colledge of Physitians and Needham.

(40) Physition.

ACtion upon the Statute of 14 & 15 H. 8. Cap. 5. on forfeit of 5 l. a month to 100 l. The Defendant as to 5 l. pleads nul tiel Record, as to the rest nil debet; to which the Plaintiff demurs, because nul tiel Record goeth to the whole, which the Defendant agreed was ill. But 2. Weston excepted to the declaration, that the Colledge cannot joyn with the King in debt, and the Patent gives no action of debt, nor is this given by the Statute that confirms the Patent, therefore this should have been an Information tam pro Domino Rege quam pro seipso, but per Curiam, debt lieth as well as Information, as on 2 Ed. 6. Cap. 13. which gives no action. 2. This action is brought for twenty months, and so not within 31 Eliz. Cap. 5. §. 5. but per Curiam, this is intended of popular actions, not where parties have interest; as here, but for Perjuries, Forgeries, &c. And Judgment for the Plaintiff.

Harvey

Aynſworth *and* Chamberlain. *Saturday*, June 10. Ante.

(46) Rent.

IN Covenant in London for Rent of Lands in Lancaſhire, the Defendant pleads Entry in Bar, which is tryed in London: And now Bugby prayed Judgment on 16 & 17 Car. 2. Cap. on Croft and Winters Caſe; and Wiſe and Adderlys Caſe in C. B. which Rainsford Chief Juſtice and Jones agreed; but Twiſden and Wild contra, that this Statute was never intended to alter Foreign pleas, elſe patment at Carliſle might be brought up to be tryed here, which would be miſchievous. Sed adjornatur.

Mayo *and* Winnell.

(47) Covenant.

DEbt on Deed of 1000 l. recitando that whereas the Defendant Cognoviſſit, that ſhe had certain demiſes of the Plaintiffs, ſhe would on demand regrant and deliver them up who was the Plaintiffs Daughter, and had married her ſelf to the Defendant, and this ſuit is againſt the Son-in-Law; the Denfendant demurred, becauſe 1. its not averred there were any Leaſes aſſigned, but only that the Defendant per Oblig. recitando that ſhe had received, &c. which per Curiam is an Eſtaple to the Defendant, and Dimiſſiones is ſufficient certainty, being according to the Obligation. And Judgment for the Plaintiff, Niſi, &c.

Hinton *and* Crane.

(48) Arbitriment.

DEbt on Obligation 14th Nov. to award by 10th Decemb. and if no award, to Umpire by 17th Decemb. On no award pleaded the Plaintiff replieth that on the 17th of Decem. the Arbitrators made none, but that the 16th of Decem. the Umpire did order to erect a Wall and give mutual Releaſes; to which the Defendant pleads non eſt fact. and excepted that the Replication is pregnant, that on the 17th of Decem the Arbitrators made none, which hinders not, but that they might award the 10th of Decemb. ſed non allocatur, it being pleaded that no award was made in Bar, its againſt the Defendant if either the Arbitrators or Umpire made any; & per Curiam, Judgment for the Plaintiff. 2. The award was to pay on or before, and its ſaid it was not paid at the day, not ſaid nor not before, but per Curiam

Curiam, paiment before is paiment at the day, as well on demurrer as on Evidence.

Molin *and* Cook.

(49) Priviledge. IN Trespass against the Defendant Simul cum two others; the Defendant pleaded priviledge of Clerk of C. B. to which the Plaintiff demurred, being joint offence and damages uncertain, so Recovery against any one with execution is Bar as to the rest; and Brown and Wottons Case, Yelverton is that Judgment against one where damages is uncertain is Bar against the other. Twisden inclined he should have priviledge, because the rest do not appear; which the rest agreed. Sed adjornatur.

Beurge *and* Shepherd. Ante.

(50) Legacy. ASsumpsit in consideration the Plaintiff would be content to accept 40 s. for a Legacy due to Ann ad tunc Uxorem, the Defendant promised to pay: After Verdict it was excepted on Yelverton 184. that it doth not appear the Wife was alive at the time when the action was brought: Which by Twisden is ill, but by Wild, & Curiam the consideration is the being content; and it appearing the Wife was alive at the time of the promise, she shall not be intended dead after, nor no matter if she were. Sed adjornatur.

Bastard *and* Stuckly. Ante.

(51) Legacy. ON demurrer to Prohibition in suit for two parts of four devised to the Defendants Wife, and her, Brother as Executors whereby the Legatees are joynt-tenants of Residuum bonorum, and so being no remedy at Common-Law, the Plaintiff in the Prohibition said he ought not to be sued there, because by the assent the Chattles are vested, and not things Testamentary: Which Rainsford Chief Justice and Wild agreed, but by Twisden and Jones, these being Executory, and not like particular Legacy of Horse, &c. the Spiritual Court having the Jurisdiction of what is Residuum bonorum, no Prohibition ought to go untill they Judge contrary to our Law. Et adjornatur.

City

City of London *and* Goree.

SPecial Verdict on non Assumpsit find there was no actual promise, but find prescription for the duty of Waiage. Symson for the Plaintiff, that in Carpenters Case here, and for the duty of Walter-Bailage Indebitatus lieth: And by Rainsford Chief Justice in the Exchequer on argument it was adjudged that Indebitatus lay upon acceptance of a Bill of Exchange, and on a Policy of assurance Indebitatus lieth, and Hob. on Sheriffs Receipt of Money, and against the Executor on Devastavit, and all the actions for Wharfage, Cranage, and duties of the City are thus; and in Bradshaw and Proctors Case Indebitatus for Fees, as Judge of the Sheriffs Court, and this Term in Woodward and Ashtons Case, Indebitatus by one Clerk against the other for Fees; and the reason of Slades Case was not on the Wager of the Law, but because he was not indebted; and by the Act of Parliament confirming the custom, this is a duty that ariseth ex quasi Contractu, and not ex delicto, though it were originally but a charge upon the Subject, for it being agreed that debt lieth, a Fortiori an Indebitatus. Judgement for the Plaintiff. (52) Assumpsit.

Eldridg *and* Crouch.

ACtion upon the Statute for not coming to Church; the Defendant pleaded a former Information depending in the Exchequer; the Plantiff replied that that was by fraud and covin; to which the defendant demurred; and Judgment in C. B. for the Plaintiff, and Error assigned that its Contra form. Statuti, not said which, sed non allocatur, demanding so much per month, but in an Indictment it were ill, and Judgment affirmed. (53) Religion.

Harvey *and* Holland. *Hill.* 27 & 28. *Car.* II. Rot. 1185.

DEbt on Obligation Infra to pay at F. not said Infra Jurisdictionem; after Issue the Plaintiff suggests F. is Infra Jurisdictionem, & quia non negatur, Ideo Ven. fa. and after Verdict upon 1 Roll. 759. this was assigned for Error, that F. was out of the Jurisdiction, and in nullo est Erratum pleaded; and it was said this is Coram non Judice, and (54) Lieu.

therefore assignable for Error notwithstanding the Tryal: but per Curiam when the Defendant pleaded paiment at the day and place, he should have said F. was out of the Jurisdiction; especially the matter of paiment being Transitory: but if it were a Local Plea, then if it were out of Jurisdiction, admittance of parties will not aid it. And Judgment for the Plaintiff, Nisi.

Ellis *and* Nelson. *Tuesday*, June 13. Ante.

(55) Sheriffs. DEbt on Obligation for Rent on Lease of Bailiwick. Holt on 27 H. 8. Cap. 24. §. 14. being a general Statute, and the Conclusion generally contra form. Stat. said it will avoid this contract for the Lease of Bailiwick of the Savoy, because 23 H. 6. Cap. 10. §. is that the Sheriff cannot let County to Farm, so this appears in it self, that the Security is void, though the Statute hath no express words to void it; but per Curiam this should have been pleaded, for though 27 H. 8. Cap. 24. be a general Law, 23 H. 6. Cap. 10. is but particular; and 27 H. 8. is but a Relative Statute, and therefore 23 H. 6. Cap. 10. should have been pleaded: and Judgment for the Plaintiff, the King being out of both Statutes

Ames *and* Cowly.

(56) Lieu. IN Ejectment of Lands called Bantford Farm, in the Parish of Blandford Forum in County of Dorset on the demise of Rogers, Not Guilty is pleaded, and a Verdict generally for the Plaintiff in B. R. Entred Hill. 22 Car. 1. the second part Rot. 642. as cited, which was affirmed in Error, and it appears only by the report that the Evidence at Bar, for the Defendant was by a Fine, &c. of Lands in Blandford Forum, which is intended of the Lands only in the Hill, and not of Bandford farm which was in the Parish and not in the Hill.

Lutterell *and* Coree.

(57) Poor. THE Defendant being in Execution for 6000 l. damages at London Sessions, 7 Apr. and 12 Apr. 1673. it was doubted if she were to be discharged on a second Oath, having not been relieved on a former a Year before, on 22 & 23 Car. 2. Cap. 20. §. 4. And 2. it was doubted if Execution for damages in Trespass be within this Statute. 3. If Executi-

on

on be on the Original suit by the Administrator, de bonis, &c. of Trespass in vita testoris, by 4 Ed. 3. Cap. 7. whether that be within this Law of 22 & 23 Car. 2. Cap. 20. §. 4. but notwithstanding these exceptions the Lord Mayor, &c. at Midsomer Sessions the 11th of July 1674, on a third Petition would have discharged her, and ordered allowance of 1 s. 6 d. per Week, and in Mich. Sessions, the 11th of October 1676 at the Old-Baily the said Ann Coree the Defendant prayed to be discharged for non-payment of the said allowance: And by Mountague Chief Baron, and Atkins Justice of C. B. the Justices that ordered the allowance may discharge, and the Statute 22 & 23 Car. 2. Cap. 20. §. 4. is not intended a discharge of it self, to subject the Goaler to false Imprisonment, contrary by Littliton Baron of Exchequer; but by the payment a day or two after the Week, or tender to the Prisoner, or putting the money under her Chamber-door on absconding, is a sufficient payment within this Statute, and thereupon she was continued in Prison.

NOta, by Hales Chief Justice, & per Curiam, Mich. 23 Car. 2. in B. R. this Act, 22 & 23. Car. 2. Cap. 20. doth not discharge any Prisoners that are so upon Mesne Proces only, unless in Execution. Nor 2. then, if at the Kings suit, or in action on any Penal Law. Nor 3. can any Prisoner be discharged, that since the 4th of April hath removed himself by Hab. Corp. And 4. the Oath 22 & 23 Car. 2. Cap. 20. §. 2. is thus intended that if debt be not Ten pounds, that then he is not worth 10 l. nor so much as will pay his debts; if the debt be above 10 l. that he is not worth so much as will pay his debts nor 10 l. (5) Poor.

DE
Termino Michaelis

28 *Car.* II. in *B. R.* Anno 1676.

Monday, Octob. 23.

Rainsford Ch. J. } *Wild. Ægrot.* came *Monday* Novemb. 6.
Twisden. } *Jones.*

Brown *and the Countess of* Huntington.

(1) Priviledge.

ON Bill of Middlesex to take the Body of the Defendant called Countess of Huntington, on 6 Co. 52. Finch plaied a Supersedeas, which by Rainsford Chief Justice and Jones ought to be granted Quia improvide, but in case of Sir Thomas Savil, on whom title of honour descended, after arrest the Court would not grant Supersedeas until Plea, but that was because it did not appear on the Writ as here: But by Twisden the Defendant ought to plead her priviledge, this day being at the Return of the Writ, and so be discharged; and in the mean time the Sheriff to let her go, and so it was in Lord H. of Esericks Case, but the Plaintiffs Attorny agreed to Supersedeas, and yet was committed to prevent a worse danger, &c.

Durand *and* Hodges.

(2) Bail.

MOlloy plaied to set aside Writ of Error tam in redditione Judicii, as in adjudicatione Executionis in Sc. fa. against Bail; which Twisden agreed, because Error lieth not of Judgment on Sc. fa. and therefore should be only in adjudicatione Executionis, but the rest doubted being on Judgment and Execution against the same Bail. Sed Adjornatur, Wild absent.

Philips

Philips *and* Cooper *againſt* Daſhwood, Ante. 670
Pl. 34. *Tueſday*, Octob. 24.

(3) Taxes.

TRespaſs of entring a Brewhouſe and taking Goods, the Defendant juſtifies for duty of Excile on 12 Car. 2. Cap. 23. on order by Commiſſioners of double after Information, no order being made by three Juſtices in fourteen days, to which the Plaintiff demurred, and by Levins, 1. Its not ſaid theſe were the next inhabiting Juſtices, but only Juſtices of the County: 2. It was ſaid that three Juſtices did not order, whereas the Statute gives power to two to do it: 3. It was not averred that the Juſtices were not Commiſſioners: 4. Its ſaid the Defendant entred the houſe of Cooper, whereas the Action is joynt for entring their houſe, and nothing ſaid of Philips: 5. The Sub-commiſſioners have power to determine Penalties and Forfeitures, and this Information is for the ſingle duty, ſo not within their Juriſdiction: 6. The order was ſaid to be by A. and B. Commiſſioners, not ſaying they were all, which by Twiſden Juſtice, is ill as that Feoffees ſhall ſell, this muſt be by all; 7. The order is by A. and B. Sub-commiſſioners, not ſaid ubi: 7. The Defendant juſtifies continuance fourteen days, which per Curiam, is ill without license, &c. And Judgment for the Plaintiff, Niſi.

Pigot *and* Lord Salisbury. Ante.

(4) Fines.

TWiſden Juſtice excepted that its found by the Deeds, that the Plaintiff was twenty years out of poſſeſſion; and though the Statute 21 Jac. Cap. 16. be not in Perſonal Actions to be taken notice of, yet in Titles it is without pleading, and the Verdict is ſi ſuper totam materiam, and not on any ſpecial point of the Poſſeſſion; and though it be ſaid the Plaintiff entred, and not ſaid when, yet on the whole it doth not appear the Plaintiff had a good Poſſeſſion, nor no title within that time, which muſt be ſhewed ſufficient: Jones Juſtice contra, That if there were no Poſſeſſion in twenty years, this is Evidence, and Verdict would be againſt the Plaintiff, but here no queſtion was on the time. Et adjornatur.

Hipſley

Hipsley *and* Tucke. Ante.

(5) Error.

ERror of Judgment in Marlborough in slander, that the Mayor at the time of the Judgment, had not subscribed according to 25 Car. 2. Cap. 2. §. 4. After in nullo est erratum, pleaded, Polyxphen for the Defendant: 1. That this is no Error, the neglect being only that which makes men incapable, on which no Error is assigned but only in assenting, §. 5. after neglect, which is a distinct clause, and of distinct penalty to forfeit 500 l. &c. and the Clause §. 9. that saith Officers shall be under the same Penalties and Forfeitures is only as to that of 500 l. &c. not to make the Mayor incapable to do any Act, nor doth, being void in Statutes, as 13 Eliz. Cap. 10. §. make a nullity, but makes void only against successor, not against the person that made the Lease; so 13 Eliz. Cap. 12. §. voids living against the Parson as to Tythes, &c. Hob. 202. pl. yet being paid shall not be paid over again to the Successor, the Statute never intended mischief to strangers; so 5 & 6 Ed. 6. Cap. 4. the Statute intends (3 Cr. 679. 919.) a proceeding; so 4 H. 7. Cap. 24. ipso Jure sit nullus, as to party concerned; and so this Statute must be intended void as to that person that neglected, not as to others that are strangers, which is most suitable to the Rules of Law that regards Magistrates or Officers de facto, 2 Cr. 554. O Brians Case, Leases of Bishops de facto shall not be avoided; so 3 Cr. 534. Entry of Goods with a Deputy-customer is sufficient; and (3 Cr. 699.) so of Ministerial acts of Stewards de facto, that the Innocent may not suffer with the Nocent. 2. This is an Error against the Record, and so not assignable, the appearance being before the Plaintiff as Mayor, and all proceedings; so 2 Co. 12. its no Error that Judg had no Commission, or surrendered it before the Trial, 2 Roll tit. Error 757. Lloyd and Best, its no Error that A. was not Deputy Judg, or not Sheriff; also in Malins and Wildens Case, Error in Marshalsey was assigned that Wilden was not Judg, which was held ill, and in the Case of 3 Cr. 320. the Plaintiff himself was Judg, and it cannot be said he was not so, and here its said the Mayor continued so all the year; and yet this is said Coram non Judice, which is repugnant; Saunders for the Plaintiff, the Protestation and Declaration being at the same time to be with the Oath, must be on the same incapacity, the other Penalties being not given for neglect, but for misfeasans. 2. Where the disability is on the Mayor

or when chosen he is Mayor de facto, as on 3 Jac. Cap. 5. §. 9. but here he was first a good Mayor, but is disabled by this Act ab Initio, as 5 & 6 Ed. 6. Cap. 16. which therefore §. 5. provided for Acts done by such, because Officers might be secretly disabled by contracts, but in this Statute 25 Car. 2. Cap. 2. the Acts thereof are notorious, and therefore the Statute intended it should make void to all intents as a punishment to the Officer which would be idle, if all acts done by him should be good, and the penalty of 500 l. might be avoided by setting up another to inform against them by contrivement, and the Statute thus cannot be said void to all intents and purposes, as the words are. 3. This is not pleadable to the Jurisdiction, for this disability happens after appearance; Its true it cannot be said the Mayor was not Judg of the Court where its said Custom is to hold it before the Mayor, but consequentially, as here it may be said he was no Mayor, and consequently no Judg; so 3 Cr. 320. and here is an Act of Parliament that is the highest Record which enables any man to this Averment, as on Judgment of Usury men may by vertue of the Statute 37 H. 8. Cap. 9. § 3. aver it by Usury, so against Fine. Twisden Justice, If the Statute makes a nullity its as well against party as all, else no Mayor no Judg, and the scope of the Statute was to disable. But 2. this Averment should have mentioned the Statute, and so he was no Mayor; as on 23 H. 6. Cap. 10. of Sheriffs, and this cannot be averred generally. Et adjornatur.

Tomkins *and* Pooly, *Wednesday*, Octob. 25.

TRespass of taking Goods, the Plaintiffs title was by deed of John George Sleigor, by Noverint universi, That I, &c. for love and affection have given and granted, and do give and grant from and after the death of my Wife the Goods in question unto the Plaintiff his Wifes Sister. Mr. Attorney Jones conceived that by deed the use and property of Goods cannot be separate, albeit by Will it may be good, especially this being to deprive the Donor if he survive, and to take effect but in futuro; the Plaintiff agreed to have this specially found by the Jury of Middlesex at Bar, because at worst he hoped for relief in equity, but after seeing the opinion of the Court, the Defendant waved this point. And Verdict for the Plaintiff. (6) Chattels.

City

City of London *and* Goree. Ante. *Thurſday*, Octob. 26.

London. (7) Withens for the Defendant, that only debt lyeth for duty on weighing Goods by Cuſtom of London, but not Indebitatus, and the reaſon of Slades Caſe Co. was on the ſuppoſed agreement, which ſuppoſeth a contract, but this doth not ſo; alſo the Caſe of a Bill of Exchange is alſo grounded on the contract by the Law of Merchants: This debt is of a higher nature than to have an Aſſumpſit, as for rent or debt that ariſeth on Act of Parliament, no Aſſumpſit lyeth, yet in theſe Caſes the parties may be ſaid indebted, nor here much leſs being an inherent right in the Corporation, and no Wager of Law can be againſt it. 3. The Cuſtom being ſaid to be confirmed by Act of Parliament its all one with Duty ariſing by Act of Parliament. 4. Its found ſpecially that the Defendant made no actual promiſe, and thereby all the other matter is out of doors; but if it had been ſaid there were no other promiſe than that on the agreement it had been well enough; but as thus its ill, as Dyer pl. Symſon for the Plaintiff, There are multitude of Preſidents in this point, as the Caſe of the Water-Baylies tried here at Bar, which after Verdict was affirmed in Error, and ſcarce any Action for Duties in the City but are in this manner, as for Scavage, &c. which are ex quaſi contractu, and the Bill of Exchange is only ſupported by cuſtom, and ſo on Policies of aſſurance, where they declare on the agreement and cuſtom, & ſic Indebitatus, and the cuſtom will create this duty without any Act of Parliament; therefore as in caſe of Bankrupſie, where on aſſignment Indebitatus lyeth ea quaſi contractu, yet is enabled by Act of Parliament, and the Jury have found ſi on the Aſſumpſit modo & forma for the Plaintiff. Twiſden Juſtice, Indebitatus lyeth not quod cum per Billam excambiæ, but by ſpecial cuſtom it doth, but the confirmation by Act of Parliament works nothing, and on ſale by Sheriff of Goods levied, or on Devaſtavit Indebitatus lyeth on the ſpecial matter, whereby the party Defendant hath made it his own debt, which the Court agreed. And Judgment for the Plaintiff.

Saturday,

Saturday, Oct. 28.

NOta, this day it was said that Dolben Steward of Westminster gave Judgment there in Action upon the Case, on consideration that the Plaintiff sent and delivered a Horse to the Defendant, the Defendant promised to pay 5 l. to the Plaintiff, which he had not done ad damnum of 40 s. After Verdict, and 30 s. damages, it was excepted by Withins that this was out of Jurisdiction, being above 40 s. and so appears on Record. Crofts contra, that the Plaintiff can have no more damages than he counts on, which is but 40 s. and therefore well enough; and for this cause Judgment for the Plaintiff. (8) Assumpsit.

Squire *against* Fullerton. *Trin.* 26 Car. 2. *Rot.* 1573.

Monday, Octob. 30.

IN Covenant by Assignee against Assignee of Reversion which was to pay the Rents thirty days arrear of the Tenants unto the Plaintiff ita quod, the Assignee Plaintiff on receit give a Letter of Attorney to Assignee the Defendant to sue the Tenants; and the Plaintiff shews for breach, that such a day Rent was behind; the Defendant pleads that the Plaintiff at a day arrear before did not give a Letter of Attorney to the Defendant on Receit, &c. to which the Plaintiff demurred, because this is but a several condition, and doth not determine the Indenture. But by Saunders for the Defendant, this can have no operation for the summ received, but must be intended that on default of Letter of Attorney the Defendant should not be bound to pay after such refusal of Letter of Attorney; but by Rainsford Chief Justice, the Assignee, may refuse to pay unless the Plaintiff would give a Letter of Attorney; also refusal of a Letter of Attorney as to one Tenant, doth not determine the Indenture as to the rest; and though the money be to be paid first, yet being Executory and to be at the same time, the refusal is pleadable in Bar of that Rent; which the Court agreed, and Judgment for the Plaintiff. (9) Assignee.

Baſtard *and* Stewkley. Ante.

(10) Legacy.

IN a Prohibition the Caſe was Johan Baſtard poſſeſt of Perſonal Eſtate, deviſed four parts to four Children, and the other four deviſed to her two Executors, D. her Son, and A. her Daughter married Stewkley, who as Adminiſtrator to her, ſued in Spiritual Court for her Legacy, two parts of four, &c. to which the Defendant pleaded the Jointenancy, and that this Legacy ſurvived; which Plea was refuſed, and on demurrer, Maſters on 2 Roll 301. §. 35. Tit. Prohib. ſaid there was a Survivorſhip in the Eccleſiaſtical Law as well as in ours, and they are proper Judges of the matter, therefore until they judg contrary to our Law that they are Tenants in common, no Prohibition ought to be granted on the refuſal of the Plea being but incidental, which the Court agreed, and that a Conſultation ought to be granted, 2 Roll 299. Tit. Prohib. But adjornatur.

Syms *and* Collier. Ante. *Wedneſday,* Octob. 31.

(11) Coſts.

GOuld prayed Coſts for not going on with a Writ of Enquiry according to notice; which by Twiſden Juſtice, ought to be on 8 Eliz. Cap. 2. §. 2. as on wilful delay, which the Court agreed, and Awarded Coſts, Niſi.

Dominus Rex and Pine. Ante. *628*

(12) Trade.

A Caſe was agreed for Judgment of the Court, on 5 Eliz. Cap. 4. §. 25. that Inhabitants may take Apprentice as parties agreed; and 43 Eliz. Cap. 2. §. 5. that Overſeers raiſe money to bind Apprentice, and bind where they ſee convenient; and 1 Jac. Cap. 25. §. 23. that they to whom ſuch Apprentices are bound by Juſtice may take and keep them; which by Polyxphen do not compell him that hath Tenement in the Pariſh, that dwelleth not there, to take an Apprentice, laying no penalty for not taking, therefore the Juſtices have no ſuch power to compell taking, but only to Rate. Hunt pro Rege, that 43 Eliz. Cap. 2. §. 5. makes it a diſcretionary thing in the Juſtices, for elſe they would be idle, for the Overſeers may do it by conſent alone; alſo 7 Jac. Cap. 3. §. 2. enforceth this, and the general practice all over England. Twiſden Juſtice, In Rolls time, a Farmor in Kent

Kent was by the Court refused to be compelled, for the intent of the Statutes was to enforce the Children that they should not avoid the service; also if by 43 Eliz. Cap. 2. Justices might compell 1 Jac. Cap. 25. would be in vain to enable Masters to take, which the Court agreed; and that it is not material whither the party live in the Parish or out, but because by increase the Tax may rise too high for the Parish, therefore adjornatur for opinion of all the Justices. *post* 854

Bradborn *and* Reading.

(13) Sewers.

EX motione Mr. Solicitor Winnington for new Trial in Trespass, where the Defendant justifies under the Commissioners of Sewers, which was after quasht; and by North Chief Just. of C. B. in Trial at York, albeit the Commissioners be not guilty by this vacat' yet the Defendant is, for whose benefit the orders were made, to tax the level on the Case of Turnor and Felgate, the Tax being to reimburse, the Defendant as Overseer, and the original Decree on the level being yet in force, and the Plaintiff within it, and this that was quasht but additional, and both were good at the time of the distress, for which this Action is brought, and in the last Trial at Nottingham it was said Windham Justice was of a contrary opinion, that neither Commissioners nor Officers were Trespassers, and a new Trial granted.

Smith *and* Abel. Ante. *Trin.* 27 Car. II. *Rot.* 1452.

(14) Assurances.

IN Ejectment: William for affection covenanted to stand seised to himself for life, Remainder to his Wife for life, Remainder to Mary for life, Remainder to Thomas in Fee: That Elizabeth the Mother levied a Fine sur Conusans de Droit come Ceo to Mary in Reversion for life, and William and Elizabeth dieth, Thomas enter'd and Leased to the Plaintiff, and the Defendant enters as Heir, &c. Lovel for the Plaintiff, That though the Acceptance by Mary doth not displace any Estate, yet its a forfeiture by an Affirmance, on record the Fee to be in her self or a stranger by aid prayer, or voucher, 1 Inst. 252. bare acceptance in Pays, Dyer 148. pl.
Penycocks Case may enure as a Surrender, which this Fine cannot, therefore is a forfeiture; and there is no difference between a Fine taken of a stranger as in those Cases, and

the acceptance from Tenant for life, in both Cases the Fee is acknowledged in the Conusee by gift and power of Cognizor, 1 H. 7. 11 pl. or 22 pl. Fine sur Conusans de Droit tantum shall enure but as an Extinguishment or Surrender, but come Ceo must operate on the Fee, but parties are estopt to say no Fee passed, & 2 Co. Buckeler and Harvey, he in Reversion being disherited may take advantage of this Estople, and this rather works as an Estople than as a Forfeiture, for he cannot have Fee and for life together, therefore shall be said only to have Fee as 9 Co. Podgers Case, Serjeant Wilmot for the Defendant on Register 243. e and Owen 146. Stiles, Garret and Blizard, and 11 H. 4. 10 Dyer 339. & 3 Cr. 757. Twisden Justice, that in Garret and Blizards Case it was expressly adjudged a Forfeiture as to the Remainder for life, as in 1 Co. Chudlyes Case, on Feoffment by Tenant for life to Remainder for life, whither it displace or not, if not its an Estople at least. Et adjornatur.

Brown *and* Wait. Ante. *Trin.* 26. Car. II. *Rot.* 427.

(15) Treason.

EJectment, the Case was Sir J. D. seised by Feoffment, 4 Car. 1. in Tail, Remainder in Fee, in Trin. 1647, levied a Fine to the same uses, and died seised 1655, leaving Lessor of the Plaintiff his Heir: Wallop for the Plaintiff, That on 13 Car. 2. Cap. 15. §. the Estate Tail is not forfeit, this 3 Inst. 126. being a new Law, and penal, is taken strictly, and him and his are the ruling words of the Act; this was the ground of Trudgeons Case, that since W. 2. Cap. 1. Tenant in Tail hath nothing, else, Hob. 338. Pl. Com. 560. & 3 Inst. 19. do overrule this Case, which were upon an Attainder, this without; and 25 Ed. 3. Stat. 5. Cap. 2. 11 Co. 63. doth not repeal the Statute de Donis, but is intended of Lands in Fee, and what he might lawfully forfeit, Elegit, Br. 13. Rent may be extended as Land, but not forfeited longer than for life of Tenant in Tail; and the general words were to shew the things forfeitable, and Hereditaments, 1 Inst. 6. imports no greater Estate in those things, but that all things inheritable may pass, but Estates for life or years may pass by these words, and is not the same with Hereditaments in 26 H. 8. Cap. 13. which is more exactly penned to forfeit all Lands the party hath of any Estate of Inheritance and before, 33 H. 8. Cap. the Estates Tail were not forfeited, 3 Co. Doutyes Case, an Attainder by Parliament which was out of the Statute,

26 H.

26 H.8. Cap. 13. not that W. 2. Cap. 1. gained from the King exemption from Forfeitures, as Hob. 340. recriminates Hob. 342. a Forfeiture as a kind of Grant, and all Lands are too loose and ambiguous to repeal the Statute W. 2. Cap. 1. As to 1 Ed. 6. Cap. 14. it appears by 4 Co. 106. that Act was grounded on special rules, and taking away all superstitious uses the lesser are included in the greater; also Estates Tail might continue for ever; Also 1 Ed. 6. Cap. 14. is no penal Law, nor hath the King advantage by the gift, but 13 Car. 2. Cap. 15. is penal, and Danvers not excepted out of 12 Car. 2. Cap. 11. §. 38. as §. 37. Cromwell is, therefore notwithstanding the different penning this Act, 13 Car. 2. Cap. Tail is not forfeit not referring to Cromwells Act, 12 C. 2. C. 30. §. 1. and there is an Attainder which is not so here by any general words, 4 Co. 46. this being the same with Conviction. 2. If the Statute intended not forfeiture of Estates Tail it hath no operation against the Fine; for 25 March 1646, Sir J. D. had no Estate but Tail, and the fiction and relation of the Statute shall not defeat the Instantaneous seisin its true, 2 Roll 473. Jones and Bull, charge by Tenant in Tail shall bind all Estates deriving under it, but here the Statute 13 Car. 2. Cap. 15. §. is the first thing that affects the Estate, and until then no charge was upon the Land in the hands of Tenant in Tail; also the words of the Statute 13 Car. 2. Cap. 15. forbids all retrospect, and that all his lands shall be forfeit to his now Majesty, and if it should relate it must be forfeited to the former King, Car. 1. Jones 73 Pl. Com. 113. this is the reason such Acts prevent Remitter, which is a beneficial fiction, this would be a fiction to make a forfeiture; also its not said that all the Lands 1646 shall be forfeited, but that the Lands he then had shall be now forfeited in whose hands soever; also here being no Attainder, 1 Cr. 123. nor forfeiture at Common Law, but according to 27 Ed. 3. Cap. 1. the intent of the Law-makers, the Statute is the Judgment, and beyond that there shall be no relation farther, but the other words serve for description; also the Son is in by W. 2. Cap. 1. therefore not (Jones 106, 107.) to be shaken off by fiction. Mr. Solicitor Winnington for the Defendant, The only doubt ariseth because Estates Tail are not mentioned in 13 Car. 2. Cap. 11. §. 38. that nothing extend to discharge trusts of Sir J. D. &c. guilty of the Treason, &c. and gives forfeiture of all Hereditaments, &c. of Sir J. D. or any in trust for him, &c. before 26 H. 8. Cap. 13. General words would not extend to Estates Tail being not forfeitable, but since that they may, which answers Trudgeons Case, 1 Inst. 130.

such

such Estates being forfeitable, its the consequence of Treason to be forfeited; & 2 Inst. 334. & 1 Inst. 3. are on the same ground; and 13 Car. 2. Cap. 15. §. 2. declares and calls the crime Treason; and §. forfeits all Hereditaments, &c. and intended not to lessen the crime by which Estates Tail were forfeitable, but only to mitigate the punishment; and though by Common Law there can be no forfeiture without Attainder, yet by Statute there may, as 8 Co. the Princes Case; also in 12 Car. 2. Cap. 11. §. there are no words to discharge or save this; and 2 Roll 503. and Spilmans Glossary, Hereditament comprehends Right and Estate, and so was the intent of this Act, and a fee simple is not expressed in 13 Car. 2. Cap. 15. yet is forfeited undeniably, and so is an Entail by construction of other words. 4. The Proviso 13 Car. 2. Cap. 15. §. 2. is that no Assurances before 25 March 1646 should be impeacht, therefore all since are in 26 H. 8. Cap. 13. there are no express words to forfeit Tail, yet as 7 Co. 34. Nevels Case in favour of the Crown, and detestation of the fact, a title of Honour is forfeited, à fortiori in this Case on this Statute, 13 Car. 2. Cap. 15. And admitting Tail not forfeited 2. by the Fine, the new Estate Tail thereby gained is forfeited without any fiction, for the Issue is estopt by the Fine to set up the first Entail, F. N. B. 212, 213. Pl. Com. 104. Fulmerstons Case, 1 Co. 46. Altonwoods Case, the new limitation in Tail will not discharge the Rent granted by Tenant in Tail, also Fine by Issue, 7 Co. 9. Earl of Bedfords Case, before Entry estops remitter; and since the Fine Sir J. D. is as seised in fee, in which Case thereby it would be forfeited by this Act, 2 Roll. 34. tit. Fraud, the Law often takes notice of previous Acts, which sheweth the justness of the retrospect to the Rebellion, &c. and a Fine with grant and render is all as one Conveyance, so 3 H. 4. 6. on Feoffment by Tenant for life, which is not sufficient to let in Dower; but here Sir J. D. had a Fee until the uses declare; and on 9 Co. 10. Dowmans Case, the Act 13 Car. 2. Cap. 15. hinders the limiting of the uses for Pl. Com. Dame Hales Case, this forfeiture is an alienation that hinders to declare the Uses, &c. 1 Inst. 22. b Twisden Justice agreed general words before 26 H. 8. Cap. 13. would not forfeit Tail, but since it will without Attainder; but as to the Instantanious seisin there is nothing, for the old Estate Tail is only Bar'd by the Fine against the party, not against the King, as to Treasons before, and 13 Car. 2. Cap. 15. was not intended in favour. Et adjornatur.

Smith

Smith *and* Talbot. *Monday*, Nov. 6.

IN Ejectment on Leaſe of Jones the Father Tenant by courteſie, and Jones the Son Reverſioner of the Mannor of Dryhill in Kent containing 250 Acres more or leſs, with Letter of Attorney reciting, whereas Jones, &c. had made a Leaſe of a Mannor containing 250 Acres, &c. and authority to make Livery according to the ſaid recited Leaſe; Mr. Attorney offered for the Plaintiff that its well enough, reciting the Leaſe well as to the Mannor, but if the Leaſe had been only of Acres, the variance had been fatal; and ſo per Curiam it is now being tyed up, by Twiſden, &c. but if it had been all which contain a different number of Acres, it had been well enough. And hereupon the Plaintiff was Non-ſuited. (16) Lieu.

Aynſworth *and* Champion. Ante.

EX motione Gold for Judgment in debt for Rent in lieu of Alomworks in Somerſetſhire, where the Defendant pleaded Incloſure as ſuſpenſion in D. To which the Plaintiff replied de injuria ſua propria, and tried in London, becauſe this Iſſue compriſeth the whole matter, as Croft and Winter, and ſo on Cr. the Trial is well enough, but per Curiam this is not aided by the Statute 16 & 17 Car. 2. Cap. 8. which never intended to ouſt the Juriſdiction of County Palatine, and Judgment ſtay'd, Wild preſente. (17) Rent.

Northern *and* Levet, *or* Reading. Ante. *Tueſday*, Novemb. 7.

DEbt againſt Adminiſtrator, a Scir. Fac. and a Devaſtavit was returned on Releaſe of B. a Priſoner at his Suit in Treſpaſs for taking away Goods of the Inteſtate, and taking Covenant from him to pay 280 l. &c. in ſatisfaction for the ſaid Goods, and whither this was a Devaſtavit or not was the queſtion, but adjornatur. Jones Juſtice conceived this Covenant coming in ſatisfaction, is aſſets, &c. (18) Executors.

Hatton

Hatton *and* Read.

(19) Devise.

IN Ejectment on Lease by Thacker, who devised D. 16 l. per annum to Robert on condition to pay to his Sisters 5 l. a year to both, and to no other, payable Quarterly, the first if a month the next after death before Quarter-day, and if this be Fee, or but for life was the question in Error of Judgment in C. B. and by Polyxphen on Co. Colliers Case, and 3 Cr. Wallocks and Hammonds Case, this is a Fee, and so adjudged in C. B. albeit the payments be but for life. But adjornatur.

Briers *and* Boulton.

(20) Powers.

ERror of Judgment in Lancaster in Replevim, where Avowry was made by Settlement, with power to Roger by Deed or last Will to give or devise to any younger Child unmarried, or what on Marriage is agreed to be paid; An Annuity out of the twenty Acres in question, to continue so long as the Daughters Portion, or what is agreed on Marriage is unpaid after the Devisors death, or any part, until they receive 200 l. a piece, that after this the Devisor agreed to pay to the Defendant Boulton 150 l. Marriage-portion, and for a years arrear the Defendant avows; the Plaintiff avers Marriage against consent, and traverseth the agreement, which is found not to be on Marriage, but to be by Grantor with Grandmother of the Avowant in her absence to provide for the Daughter, and if this were an agreement within the Power was doubted. Weston for the Plaintiff in Replevin, that the Fathers Power was to secure the Husband of his Daughter, and the agreement is found to be without any prospect of Marriage, and destroyed by Marriage without assent, so the Bar had been ill on demurrer, this agreement being not intended every discourse, but such as may be a provision of the Daughter, and not to exclude the Fathers Power on Marriage. 2. This agreement is fact, and the finding it specially is ill, as Co. Chancellor of Oxons Case. Levins for the Defendant in the Writ of Error Avowant, the traverse is absque hoc that the Father did agree to give Marriage-portion, which is fully found by finding this Deed for the Daughters provision, which is of the same sense, and this is sufficient to raise a Use whither it were on Marriage or not, or whither there were any agreement or not, and must be intended that whatever is agreed or unpaid

paid at the Grantors death should be paid, and this is a present security, and cannot leave it arbitrary in the Father to give her any thing or nothing, so the Power is well executed by Grant on the later agreement, being said in execution of the Power. Wild Justice held this Verdict but Evidence, and ought to say agreement or not agreement precisely, and so many circumstances will never make the Issue; which the Court agreed, but adjornatur; but the Court conceived this agreement for provision to be all one as for Marriage-portion, being all, and Issue being on affirmative and negative its well enough.

Dobson *and* Bell. *Trin.* 28. Car. II. *Rot.* 297.

LEvins on Trin. 20 Car. 2. Litcot and Packwells Case, Judgment affirmed in Error in Trover de Term. generally on cause of Action accrewed within the Term, prayed Judgment in the like Action of Trover stay'd after Verdict for this cause, and by Wild Justice it must be seen what day the Bill was actually purchased and filed, and if this be subsequent to the cause of Action, its well enough, as the appearance of the Defendant is from Bail actually filed, which may appear well enough by examination, and else no action would lye until after the Term, for cause in Term, and the memorandum that such a day specially protulit Breve is no estople to examine the true day of the Bill. Et adjornatur to Examination. (21) Dayes.

Price *and* Davies. *Trin.* 28. Car. II. *Rot.* 1428.

ERror was assigned by Williams of Judgment in C. B. in Trover de 10 Juvencis Angl' Bullocks and Heifers, which per Curiam, is well enough without saying how many of either, Juvencus being a proper word for both, and the Angl' void; but agreed that Ovibus matricibus & vervicibus is ill for not distinguishing, and its not material, the Judgment were but by nil dicit, being all one as to this as on Verdict. But adjornatur. 694 pl. 26. (22) Trover.

Higham *and* Barfold. *Wedneſday*, Nov. 8.

(23) Breve. MR. Attorney on 2 Cr. 256. Cottons Caſe, prayed Bail to be taken in the name of the Defendant, and ſo conſeſt might be vacated, the Stat. 21 Jac. Cap. 26. §. 2. making it penal to the offender, not to the Defendant, nor can the Defendant have Aud' Quer' nor Identitate Nom. & 1 Cr. becauſe the record is in the name perſonated, to which Twiſden Juſtice inclined upon Farrs Caſe, where Judgment in Ejectment againſt the Tenant that had no notice was vacat, and to this the Court inclined. Sed adjornatur. Pl. 25.

Dominus Rex and Gerrard. *Thurſday*, Novemb. 9.

(24) Pardon. THe Court conceived the Pardon for the murder of one Clerk, Licet Indictatus vel non, is ſufficient, albeit the Indictment be not recited, notwithſtanding Dudlics Caſe, but if there had been a conviction it muſt be particularly recited, & allocatur per Curiam.

Higham *and* Barfold. 154 Pl. 23. *Friday*, Novemb. 10. Ante Pl. 23.

(25) Bail. JEoffries on Paſch. 22. Car. 2. Spicers Caſe in this Court, who was on Cap. ad Sat. Bail to Sheriff in name of Rawlins at Suit of Keily, and reſolved that ſince 21 Jac. Cap. 26. the Bail could not be vacat being ſo penal, and if the party be acquitted on proſecution for felony, the Plaintiff hath no remedy; but on bringing in the debt 60 l. the Defendant was delivered; and by Wild Juſtice on Tymberlyes Caſe, its no Bail until filed, and only where filed.

Price *and* Davies. Ante. 693 Pl. 22.

(26) Trover. WIld Juſtice on Trin. 24 Car. 2. Rot. 462. Trover de 20 Ovibus vervicibus & matricib. held ill, conceived this ill, but Twiſden on Sawyer and Ruſſel 1651, after Verdict Stiles, held well, and Emeryes Caſe of a Library and Books held it well. 2. It was de 20 Numeris Straminis, Anglice, Thraves of Corn; the Court inclined both well enough, but agreed to plead de novo, paying Coſts.

Cockerton

Cockerton *and* Holland. *Hill.* 27 & 28 Car. II. *Rot.* 4.

REplevin, The Defendant avows that locus in quo is (27)
called the Star in poſſeſſion of D. for Rent arrear; Lieu.
The Plaintiff in Bar pleads, not making any new Aſſignments, that the Defendant took the Goods in the Plaintiffs Houſe as alledged, abſque hoc that he took them at the Star; to which the Avowant demurred, becauſe the Plaintiffs Houſe is agreed to be the Star. Holt for the Avowant, The place is traverſable, and the Inducement only defective, which is aided by a General demurrer as this is; which the Court agreed, and the Avowant ſhould have pleaded that the taking was at the Starre, abſque hoc that it was in the Plaintiffs Houſe, Domus manſionalis in a Town being ſufficient certainty, 22 Ed. 4. 51. per Brian is well enough, and againſt 3 Cr. 372. & 6 H. 7. 6. the Plaintiffs Bar to the Avowry is Informal, and ſhould have been that theſe are ſeveral places, abſque hoc that they are the ſame as by the Avowry is ſuppoſed, but being doubted whether the Plaintiffs Houſe be parcel of the Star-Inn, Judgment for the Plaintiff, Niſi Iſſue be agreed.

Pigot *and* Lord Salisbury. Ante. *Saturday*, Novemb. 11.

SErjeant Pemberton for the Plaintiff, The main point is (28)
on the Fine, Hill. 7 Jac. by Mintern and his Wife ſur Con- Fine.
ceſſerunt, if that work a Diſſeiſin, in which Caſe a Collateral Warranty diſcends from Sir Oliver upon Sir Thomas Lee the Leſſor of the Plaintiff, and it works no Diſſeiſin which is moſt ſuitable to the intent of the parties and moſt ſuitable to the Fine it ſelf, and moſt agreeable to former Caſes, this was moſt beneficial for the Conuſors, and of leaſt danger; a Purchaſe was intended by the Lord Salisbury, but all underſtood that by reaſon of Olivers Infancy one Conveyance would not do, therefore they go out of courſe; had there been a Diſſeiſin there would be a preſent right of Entry in Sir Francis Lee, which would defeat the whole Purchaſe, but by this Fine Mintern paſſeth their Eſtates for life, and Remainder in Fee to the Wife; and if Sir Francis Lee had entered he might by Fine have de-

ſtroyed all the States, and ſo defeated the Defendants Purchaſe, and to intend a Collateral Warranty to operate, which could be of no effect until Sir Olivers death, and a Fine come ceo would have made a Diſſeiſin, therefore the Fine ſur conceſſit to two ſtrangers is to do that per plura that might be per pauciora; alſo the Diſſeiſin might as well have been by Fine to the Lord Salisbury himſelf; alſo if Diſſeiſin were intended they would not have left it in ſuch doubtful terms as here by proving the Eſtates of Mintern and Uxor for life, and in Stiles 92. Pl. Garret and Blizards Caſe, Rolls ſaid if intent were not to paſs unlawful Eſtate he ſhould have named his own. 2. Theſe Fines will bear this intent, the Tenants for life paſſing what they have, and the Fee by another Fine, and the Bargain and Sale by Francis, which Warranty makes the Plaintiff lyable to anſwer in value to the Purchaſor, and thus all parties may be ſatisfied. 3. Though Fines be now the moſt effectual conveyance, they were originally but agreements of Sarjeants at Bar; and 44 Ed. 3. 26. amendable by the Judges, according to the intent of the parties, but they may be Diſſeiſins when they can have no other intent, as a Fine come ceo by a particular tenant, but a Fine ſur conceſſit is only a Grant of totum Statum; ſome Fines ſur conceſſit expreſs no Eſtate of parties which are adapted for conveying Fee or Tail, but Fines by particular tenants are with totum & quicquid habet, and here parties were cautious to expreſs their Eſtate; and in Francis Caſe 17 Ed. 3. 16. pl. Fine de toto & quicquid habet for life of Wife was refuſed by Willoughby, becauſe perhaps they have nothing; and 44 Ed. 3. 36. Sir Giles Daubeny's Caſe, the like, and parties were put to levy fine upon the releaſe, and theſe fines are of continual uſe; a Grant of Tenement & totum & quicquid habet for life, would work no Diſſeiſin, nor can enlarge the word Tenementa, but explain what Tenements, viz. totum & quicquid habet therein, and the Habendum for life of the Bar. & Fem. can work no Diſſeiſin though a greater Eſtate than they had, there being Tail to Francis Meſne, for Eſtates may paſs by fractions where they cannot paſs otherwiſe without injury, and the Habendum muſt be reddendo ſingula ſingulis what the Wife hath for her life, and what the Husband hath for his life; the ground of the rule of not paſſing Eſtates by fractions is only convenience, for if there is any miſchief, or where intent is otherwiſe the Judges never ſtand on this rule. But 4. it appears 14 Ed. 4. 4. that Tenant for life, and he in reverſion in fee joyn in Grant to B. for his life, if B. dieth it returns to them again as divided as at firſt, and ſo on

Reco-

Recovery in Waſt, ſo 27 H. 8. 14. and 1 Roll 854. Tit. Eſtates, and 1 Co. 73. Bredons Caſe was Fine Come ceo, yet the Eſtate for life remained, ut res magis valeat, which is ſtronger than our Caſe. Mr. Attorny Jones for the Defendant, Bridget and William Tenants for life of Briget, expectant on Leaſe to Coleby, Remainder in tail to Francis Lee, who married the daughter of Mintern, Remainder to William for life who grants tenement' prædict. to Dackom and Hawkins with another clauſe, & totum & quicquid habent for their lives, Habendum for their lives with warranty not generally of tenement prædict. but ſpecially during the life of Baron & Feme and the ſurvivor, and on this Fine the cauſe depends, if by this Fine there be any diſplacing as there is, which is all one as to the diſcent of the warranty with a diſſeiſin. 1. If there were no Tenant for years it were ſo, the particular Tenant having taken upon him to grant a greater Eſtate then he hath, though it determin before, and if this be underſtood a grant firſt to the Wife for life, and after for the Husbands life, it takes off part of what is granted; the former words for their lives being not to be ſatisfied otherwiſe, and this was the reaſon of the forfeiture on Garrets Caſe, 1 Roll. 855. where it was taken as one intire Eſtate, and the difference of 1 Co. 76. Bredons Caſe had an intire Eſtate extracted ſufficient to ſatisfie the grant, and the words totum Statum ſuum make no reſtriction but are accumilative, and Lit. Sect. 613. knits up the grant & habendum to totum Statum, but in our caſe there is another Eſtate in the Habendum, ſo abrupt ſent for he went to the King. Poſt, 690. Pl. 31.

The Duke of Albemarle *and* Cutler.

REplevin, The Defendant avows ſole for Rent arrear to Wife, dum ſola. Hunt aſſigned this for Error because hereby the Wife would be deprived of arrears on his death, and 32 H. 8. Cap. 37. gives the arrears to the Husband only on ſurvivorſhip. 2. There are here two miſericordia's againſt the Husband, which is contra to the Statute 17 Car. 2. Cap. 7. Sed per Curiam at Common-Law the Husband might Avow alone, but if he were to demand the duty it were otherwiſe, or if the Wife were made the Defendant, there they muſt both avow. 2 Cr. 443. 3. The Judgment here ought not to be for the value, becauſe for arrears is of another effect than on Rent; and the Executors of the Husband (29) Bar. & Fern.

band are not liable to the Wife for what is recovered. And by Twisden the Husband cannot avow as Bailiff to the Wife: Also by 17 Car. 2. Cap. 7. is but an Award, not a Judgment, and if there be two joyntenants of a Rent and Replevin be against one, he may avow sole for Rent granted to him and his Companion; & per Curiam this cannot be otherwise. 3. On the double misericordia Adjornatur, on Co. Beechers case, F. N. B. 69. in Replevin 43 Br. 56. Recordare Br. 1. Ret. d' Avers 31.

Covet *and* Marshall. *Monday*, November 13.

(30) Error.

DEbt on Judgment in Assumpsit in B. R. prout per record' Ibid Remanent' apparet, The Defendant pleads that Actio non, because that Post Judicium a Writ of Error was brought in the Exchequer Chamber, and the Record removed thither, and Ibid' remanent not discontinued or Reversed; to which the Plaintiff demurred. And by Wild Justice this is but a nul tiel Record being in Bar, but in abatement had been good, and this was the difference in Exchequer-Chamber, and to this the Court inclined. Sed adjornatur.

Pigot *and the Lord* Salisbury. Ante. 695 Pl. 28.

(31) Fines.

MR. Attorny proceeded if totum & quicquid had been omitted it must be a displacing, and these words make no restriction; and the id est totum Statum is a strained construction, and might as well be intended that where the Tenant for life grants for his own life it may be extended to anothers, and if totum & quicquid make restraint making an Estople of no effect as to the warranty, which 10 Co. 96. Seymors Case never extends beyond the Estate granted, it would be of no effect; so of Covenant whereas it was intended for the benefit of the Grantee to take in all. 2. These words are in a distinct grant in the Fine, subsequent to tenementa prædicta the Concesserunt is of Tenementa, and the Reddiderunt is of totum quicquid, so cannot by interpretation without express words go in restraint of each other, as Hob. 171. Stuklys Case, in the same clause it might. 3. This totum & quicquid in the Reddiderunt is not the totum & quicquid that can be here used as a restriction, not being all his Estate, Right, Title and Interest, but all that he hath for the life of the Baron & Fem and longest liver, which is the same

same thing with the limitation in the grant and affirms the same Estate, and that which puts the case out of question, Is 4. the clause of warranty, which is not general, but of the Estate in this form for life of Baron & Feme and longer liver, else they would not have warranted the other Estate of the Baron & Feme, nor could they, for totum Statum passed before, and the warranty shews an expectance of the particular Estate warranted; the consequence whereof is that not having this Estate, there must be a devesting, and 2 Cr. 696. Eustace and Scowen comes not to this Case, the words totum & quicquid, as Jones 55. was not regarded nor was of use in that case, being resolved that joynt-tenant is in by grant of the other, as by a Release, and the grant and the totum & quicquid is only for life of the Wife adequate to the Estate they had, so this could be no question whether totum & quicquid did restrain as to the forms of Fines, Rast. 349. they are not applicable to this case, there being no Precedent that he that had for one life granted for anothers, or otherwise than they were seised. 3. As to the Construction of Law where there are express words the Law will not render them doubtful, as here it should; and in Garret and Blizards Case it was resolved, that the Court could not take off from express words to save a forfeiture; and that the parties did not design a disseisin or forfeiture that is not material, for in all cases forfeiture is the effect 1 Cr. 391. of Ignorance, and never intended by the party: Also by the acts done its plain here was a design to displace, when Oliver Lee a stranger is taken in to the Conveyance of Baron & Feme to make a Collateral warranty, which could signifie nothing if there were no devesting; and though Francis might have entred presently, yet his Father Sir Oliver had Power over him. 2. Admitting here if in possession were a devesting, the term of years doth not hinder it, for though a Fine sur Concessit be Executory 41 Ed. 3.14. and until Execution no Estate passeth, yet a Fine may as well be executed by matter in Pais, as by Scire Facias, being 1 Co. 106. Dyer. 376. as a real action, where Entry after Recovery is as effectual, as on Hab. fa. sued out, and so is 38 Ed. 3. Scire Facias Br. 199. and this Twisden Justice, &c. agreed: also an Attornment 8 Ed. 3. 44. (Seu) pl. is a sufficient Execution, and then its as effectual as a Fine come ceo; and if the Attornment were no sufficient Execution, the entry were, and then the Term will not hinder the displacing, as Fine by Tenant in tail is Discontinuance, 1 Inst. 332. notwithstanding Lease for Years, and if it may

be

be discontinued a Fortiori displaced. 3. Here is an ancient settlment long enjoyed, and no Entry appears by lessor of the Plaintiff within 20 Years, but possession being found on neither side certain, this was waived, but per Curiam, Præter Wild, Bridgeter's death is found 1646. and Entry by lessor of the Plaintiff, 24 Car. 2. which is above 20 Years, but by Jones Justice, continuance in possession by Tenant pur auter vy after death of Cesti que vy, being no devesting, is not within 21 Jac. Cap. But by Wild Justice, the Statute operates not in this Case. Et adjornatur.

Dominus Rex and Holt. Ante.

(32) Mandamus.

Bigland excepted to Return of a Mandamus, that the Return is that he was absent only, not shewing he was summoned, which per Curiam is needles, the Charter being to remove at Will. 2. It was excepted, 1 Roll. 499. Abridgment, that it was not said any Counsel was called, so the removal might be at the Tavern, sed non allocatur, being but at Will. But by Twisden Justice here being no sufficient cause of removal it should be shewed that the Corporation did by some Instrument determin their Will, and so was Blagraves Case, for they cannot do it by Paroll, and notwithstanding 1 Roll. 172. pl. and 13 H. 7. 17. b. per Curiam, the Return is ill: But Offly excepted upon 1 Roll. 409. and 3 Bulstr. 190. that the Writ is not well directed Capitalibus Burgh. but must be to the Mayor Bailies and Capital Burghers, which the Court agreed, so 12 Co. and it was quasht.

Dominus Rex and --------

(33) Maintenance.

Stroud excepted in arrest of Judgment, in Indictment against the Defendant and others, quod manutenuerunt, not said & Quilibet eorum, and the rest are found not guilty, so ill, as Indictment of using Trade, Cr. or for not repairing the Street, Sed non allocatur, this being a several Offence, the finding one guilty is sufficient. 2. It was said in B. R. not said ubi fuit, which per Curiam is ill, but Judgment being entred he was left to Error.

Plomer

Plomer *and* Whitchcot. Ante.

Special Verdict in debt on Escape. Wallop for the Plaintiff, that it lieth, supposing debt lieth against Warden of the Fleet, on 13 Ed. 1. Cap. 11. or 1 Rich. 2. Cap. is not material, it lieth against the Defendant albeit not in possession. For 1. as it is an interest of Inheritance and transferrable, its parallel with other Interests where they are consistent with the Rules of the Office: As Officer may grant for life, but not for years, 9 Co. 96. because the matter is not capable of it; unless as Prior and Beals Case, in Exchequer it have been so usually granted; and for the Privity Lit. Sect. 452. of particular Estate and Reversion for Release or aid, or by Lessor of Tenant for life, the Reversioner loseth, so 1 Inst. 262. by his non-claim, because they are as one Estate. 2. This is a publick Office, and whither in a Droyt 39 H. 6. 33. or a Tort, the superior is liable within 13 Ed. 1. Cap. 11. and 1 R. 2. Cap. 12. if the Defendant before Escapes had granted Office in fee to D. he should not be answerable for Escapes after having reserved nothing to himself, but here by reserving Reversion he is a superior, which is not only between Officer and Deputy, but where one hath power to Elect or Recommend; or where one Officer depends upon another, the Electors as the County for the Coroner, 4 Inst. 114. are chargeable as Superior, being so made by the Power of Election, so 2 Inst. 175. and 4 Inst. 114. of the Sheriff, and thus to Recommendors, 11 Co. 92. Execution being nervus legis, and for such as are only dependants 9 Co. 98. is express, as 39 H. 6. 34. and this 9 Co. 48. is the certain case wherein he is liable, especially if the Grantee be only deputy, as Dyer 278. pl. 5. and 3 Cr. 384. Earl of Pembrook, this being but an Inferior Office derived out of Superior, as Marshal of C. B. to Earl Marshall, Poph. 119. its agreed that forfeit of Inferior goeth to Superior; but in both cases where there is only a misdemeanor and no forfeiture, the Superior 2 Inst. 382. shall answer this, not being intended of a deputy, but as Sheriffs of London to the Mayor who is chargeable for their insufficiency, albeit no Gardian within 13 Ed. 1. Cap. 11. The maxim of Respondeat Superior is by Common-law, and not 13 Ed. 1. Cap. 43. introduced by Statute; but all Nations and Laws serve themselves with this Maxim, and within this there may be a multiplicity of Superiors as far as the reason of Law will go, so far 2 Inst. 466. as the King and People are concerned; in Mors and Slews Case, it was agreed that (34) Escap.

the Owner of the Ship was chargeable for insufficiency of Mr. Datur Electio Creditori, to sue the Master or Substitute, as against Principal and Surety, so whether Lessors, Electors or Recomendors having not abandoned the right of the Office but divided it, and they are but as one Office as to their dependance, Linwood Lib. 3. Fol. 73. the Cure of Church is divided between the Rector and Vicar, the charge of the Goal is divided between them, D. being the proper Officer quoad agere, the Defendant quo ad Habitum, one being but a delibation from the other, and Cumulative not Privative of the Defendants right, and this agrees with 51 H. 3. pag. 11. §. 8. de Scaccario, which is but ankirmance of Common-law, which includes several Superiors; and the Marshal here is intended the Marshal of England, who was placed Marshal of B. R. &c. and 2 H. 6. Cap. 10. is but affirmance of Common-law, and extends to all Officers and Ministers of all Courts, the Oath being added only for Caution and of abundance. 2. The Court of C. B. do but only approve, which was not done in 39 H. 6. 34. and only for Caution. Also 3. here is a willful forfeiture whereby the Office is or may be revested in the Defendant as at first: Also the Defendant hath taken Security. Mr. Attorny Jones for the Defendant, The taking Security is used in Evidence to find Escape, but cannot be used to make him chargeable that is not. 2. The reservation of Rent being void, as such the Defendant is as chargeable as much without Rent as with. 3. That the Defendant had no notice of insufficiency is not material, there being none to give it: Neither 4. is the rule of C. B. any thing to discharge the Defendant, but as an opinion that he in Reversion is not chargeable. 1. Not within 13 Ed. 1. Cap. 11. which extends not to Execution for debt, 7 H. 6. 5. Escape Br. 9. &c. Pl. Com. 35. but to Executions for account, and 1 R. 2. Cap. 12. did not think it so, because they provide for it; but admitting debt lieth for Escape on Execution for debt, yet other special parts of 13 Ed. 1. Cap. 11. extend not to debt, the scope of it being to give Lords a speedier remedy against their Bailiffs, giving them power to assigne Auditors to them without other remedy than on ex parte talis in Exchequer, which in this case its clear, extends to no others, but would be a great oppression if it should. 2. Prisoners on account are to be handled otherwise than men in Execution for debt, viz. by Fetters, which cannot be used to Prisoner for debt, 1 Inst. 260. who is only kept propter Custodiam, not propter Pœnam. 3. There are certain persons made chargeable in account by 13 Ed. 1. Cap. 11. then can be

charged

charged in debt, viz. the Keeper of the Goal Infra libertat' vel extra, but the Goaler of the County shall not answer for escape on Execution in debt, but the Sheriff; 3 Co. 71. Westbyes Case, so on removal, omission of any out of the Indenture of the Sheriff is escape, because he only is answerable; hereby its plain there is great difference in the clauses, and that Respondeat Superior was only fitted on Execution on account before Auditors, not to the case in question, for if Respondeat Superior extend to the Grantor or Appointor of Officer, yet the Defendant as Reversioner is not in propriety a Superior, but the Law rather regards him that hath the present Freehold; and if they be as one, there is no superiority, nor can there be any Tenure Co. Jewells Case, between them, so neither doth depend on other: Also supposing the superior extends to debt on Execution, it may be intended where the Sheriff appoints the Goaler, or Lord a Bailiff which are but as Servants, and abundantly serve to satisfie the word Superior beside this case; and in 13 Ed. 1. Cap. 2. Superior is used in the former sense, and was not intended more here, and if otherwise there would be no end of Superiority, whereas 2 Inst. 382. Superior extends but to the next immediate Superior, and in case of a Bailiffwick in fee, who grants for life only, the Lord is the Superior, and there is a Congruity with other cases to make the Lord or the Sheriff a Superior, but none to make the Reversioner chargeable, and 20 Ed. 4. 6. for default of Bailiff of Franchise, albeit, but for life chargeth the Lord, 38 Ed. 3. 25. he was so at Common-Law, against 3 Cr. 368. is Moor pl. 987. and reason and common experience; the Marshal of B. R. is but a Branch of Earl Marshal, but deputy, Br. 7. is otherwise of a Grantee for life, and Tenant for life that surrenders the Office is not chargeable, yet surrender is in by recomendation, and by his bringing in; and if he were chargeable as a Reversioner, then not only the Heir of him in Reversion, but his Assignee would be chargeable, which is clear otherwise. 2. The Defendant is not chargeable by Common-law, for that gave no action of debt for any escape nor gives no remedy against the Superior, but on appointment of a Lord or other that hath superiority, and 4 Inst. 114. is only in case of the Kings Prerogative, which is not proportioned to other cases, meer recommendation to the King, who cannot mind particular Concerns makes men responsible, which is not to be paralleled with other cases, and 15 H. 3. pag. 5. 8. is only where the Superior Officers of Courts appoint under Clerks, which is not like him in

Reversion nor signifieth any thing, the opinion of Co. Lord Salisbury's Case, was never put in practice, but continual experience contra, and 39 H. 6. 34. no notice is taken by the Court of this, but only suggested by Counsel: Also the Submarshal was lookt on as deputy, and so called Dy. being a lesser Officer derived out of a greater; and the Rule of Court is suitable to the Law, to enquire of the validity of the Tenant for life, because the Superior is not answerable, and a forfeiture is not to be presumed, and if the Defendant be charged, Infants may; and its impossible any such Officer can part with his Office on any Security, which cannot be given. Wild Justice 16 Ed. 1. Escape Fitzh. 41. hath not been answered. Twisden Justice, the Respondeat Superior was only in the Kings Case at Common-law, which Wild agreed. Et adjornatur.

Southcot *and* Stowell. *Friday*, November. 17.

(35) Covenant. COvenant on Articles to assure by a day future, and the Defendant to pay 900 l. on assurance of good and sufficient Estate by William, against the Heirs of Poph. Southcot; the Defendant pleads there was no good Estate conveied, and on Issue thereon Special Verdict find Tho. S. seised in Fee, and on Marriage Covenant to settle by Fine before St. Andrews day, and in default thereof would stand seised to uses in that deed of Covenant, viz. to Poph. S. his Son and the Heirs Males on his then Wife and any other woman, and on default thereof, to the use of the Heirs Males of the body of Tho. on which the question ariseth: Tho. having Issue, Poph. and William; Sir Poph had Issue, Edward and five daughters and died; then the Wife died, then Tho. the Father died; Edward died without Issue Male: and if William takes is the doubt, if he doth then its with the Pl'. Baldwin the Kings Serjeant the Fee remained in Tho. and by the death of Edward without Issue, though he had both Estates in him, yet not confounded, but William shall take as Heir Male of Tho. and the daughters of Poph. shall not take only the fee, on 1 Co. 110. Shelliés Case, it being the intent of Tho. that all his Issue Male should take, albeit there be no limitation to Tho. for life, but to the Heirs Male of Tho. which first vested in Poph. but the limitation to the right Heirs of Tho. the daughters of Poph. might take; but being to Heirs Male takes per form. Do. there being an Heir Male in whom

whom the Remainder vested, and so the rules of coming in as Heir by discent or purchase are not applicable. Serjeant Says for the Defendant, That the daughters take, and not William. For 1. Tho. had no new Remainder but the old fee, so albeit this were a good Entail in its Creation, yet when the Estate tail that was but in Contingency, &c. was vest and is spent, William shall never take unless both Heir and Heir Male, taking as a Purchasor, on Hob. 32. and 1 Inst. 164. 33. as if it had been an original Purchase to A. and to the Heir Male of the body of the Father. But 2. this is no good Cate tail in its Creation, on Dyer 156. pl. 24. Greswells Case, because the Issue of the Body of Thomas cannot be made Purchasors without putting the whole fee out, therefore the daughters take as Heirs at Common-Law, so William had no good Estate, and so the Covenant not broken, 1 Inst. 22. North Chief Justice conceived plainly that since 13 Ed. 1. Cap. 1. a discent is guided otherwise than by the Rules of Common-Law, but in Case of Purchase the taker must be Heir and Male, and Edward was both Heir and Heir Male to Thomas, so the Estate well vested as a Purchase, the discent shall be guided by W. 2. Cap. 1. and shall go to William as the Male Issue of Thomas, albeit not Heir general. Windham Justice, ad Idem, clearly being once settled in Edward, it shall go to William. Atkins ad Idem; had Edward died in the life of Poph. or Thomas, then William could not take, being not Heir, but in Edward all the Estates were, and by his surviving Poph. William takes well by discent according to the limitation. Scrogs, Edward takes as Heir Male of his Father, and not as Heir Male of Thomas, so William comes in as a new Purchasor, as this Remainder to the Heirs Male of Thomas, so must be Heir as well as Male. But 2. per Curiam, præter Windham, though this be by way of Use, the Remainder to the right Heirs in fee of Covenantor is void, but as a Remainder. Sed adjornatur.

Huit *and* Hill. *Saturday*, November. 18.

Serjeant Stroud paied Prohibition to Wells to Libel for the Feathers of Old Geese sheered, and young, suggesting modus of a young Goose with the Feathers, paied 1st Aug. yearly in full of Tyth of all Geese and Feathers; & per Curiam, a Prohibition granted, because this is more then by Law the Parishioner is bound to keep a Goose Feathered until the 1st of August. (36) Tythes.

Dominus

Dominus Rex and Spooner, Fish, *&c.*

(37) Trespass. IN Information of Assault and Battery, Riot and Rescous of one Bens arrested and in Custody of Bailiffs; Special Verdict find the Defendants did Assault Riot, &c. but that they did not Rescue, nor no Writ was taken out by the Sheriff, and if upon this matter the Defendants be Guilty de premissis, pro Rege. And by Sanders this involves all, but per Curiam de premissis & de aliqua premissorum is all one, and the offences being several, the finding guilty of any one is sufficient: And Judgment for the King.

Dominus Rex and Holt. Ante.

(38) Mandamus. MR. Attorny Jones, That the Mandamus to the Mayor and Capital Burgesses is sufficient, being that part of the Corporation that did the wrong, on Dyer 333. pl. which is to the Mayor alone, and another to the Mayor and Aldermen and Sheriffs: and in Eslicks Case, Mandamus to the Mayor Citizens and Commonalty was in debate, because the Mayor and Aldermen had the power of a motion of Common-Councilman, and held good either way; and in Dr. Patricks Case, Mandamus to Senior Fellow who had power to admit, was held good without name of Colledge, which the Court agreed, the Recorder being to continue only at the Will and Pleasure of the Mayor and Capital Burgesses and major part, Quorum Major to be one, and not at the Will of the whole Corporation; and therefore the Commonalty have nothing to do with it, and if the Corporation return that they have no power to restore him as they may, its good, so 2 Roll. tit. Restitution. But Twisden Justice, that the Capital Burgesses and Mayor cannot restore, albeit they may Elect and Amove. Sed adjornatur.

Norden *and* Levet.

(39) Executors. SAnders for the Plaintiff, That this is Assets, it appearing Hope was on these Articles to be discharged out of Prison, and the money in lieu thereof shall go to the Executors of the Defendant, the Administrator, and if H. be ever sued he may plead this agreement in satisfaction in Bar, and unless

unless the Defendant be charged he will go away with the money, and no remedy, so notwithstanding here is no express Release, its Assets. Polyxphen for the Defendant, that one N. owed 800 l. by Recognizance to the Plaintiff, and made Executors, and before Probate the Defendant takes out Administration as Principal Creditor: and Hope having imbezilled the Goods, the Defendant brings Trover, and thereon these Covenants were made, but nothing ever paid to the Defendant; so this nor the having a Judgment will not make any Devastavit in the Defendant, the remedy being only bettred hereby; but per Curiam being to be paid to the Defendants Executors or Administrators for the Goods, its Assets. Sed adjornatur.

Miles *and* Bateman, &c. *Monday*, November 20.

EX motione Serjeant Barwell that reddidit se duly entred, may stand, and that the filing of Capias may stay, the Court conceived that albeit debt lieth upon Recognizance of Bail after Judgment against the Principal in B. R. the debt being reduced to certainty by the Judgment, yet not until after the time of the second Scire Facias, the Bail having till then to bring in the Principal. Sed adjornatur. (40) Execution.

Warwick *and* Bradbon.

IN Replevin the Defendant Avowed for Rent granted by A. for years, determinable on his life on Bargain and Sail by J. S. to D. to the use of J. S. for life, Remainder to A. for life, Remainder in fee, and that the next day J. S. by Lease and Release conveied to A. not producing the deed, which per Curiam, on 1 Cr. 441. pl. is needless Cestui que use being in the Post. But by Twisden Justice Cestui que use Tenant for life, and Remainder for life must shew the deed, being but a particular Estate, and by 27 H. 8. Cap. 10. §. the Feoffee is, but as a Wall from which the Ball rebounds unless there be a warranty, then the Feoffees shall keep the deeds. Sed adjornatur. 711. pl. 51. (41) Rent.

Dominus

Dominus Rex and Brown.

(42) Baſtard. EX motione, Thomſon to ſtay Information brought againſt the proſecutors, &c. of the Defendant for a Baſtard: Twiſden Juſtice ſaid 18 Eliz. Cap. 3. ſhall be taken by equity, and albeit Baſtards are intended Children born, yet the Juſtices may take ſecurity of ſuch as are Big, or of reputed Fathers during that time, leaſt they be gone before the Child be born, which the Court agreed. Sed adjornatur. Lamb. J. P. 119.

------ *and* Clatch.

(43) Payment. DEbt on Oligation of 600 l. The Defendant pleads that condition was to pay a leſs ſum by a day, and that before the day he paied in ſatisfaction, which per Curiam is an ill Plea, having not demanded Oyer of the Condition. 2. The Plaintiff replied, demanding Oyer, that the condition was to pay a leſs ſum by a day, and the Defendant demurs without ſhewing that the money was paied at the day, which per Curiam is ill; and Judgment muſt be againſt the Plaintiff. Sed adjornatur.

Dominus Rex and Moor, &c. *Wedneſday*, November 22.

(44) Infant. BIgland excepted in arreſt of Judgment in Information for Riotous taking away one Taylor Spinſter Innupta, and of the age of 14 and under 16, contra formam Statuti, That this Court cannot fine, but only the Starchamber, &c. 2. Its not ſaid ſhe was a Mayde or Woman Child. 3. It was ſaid ſhe was of Subſtance 1000 l. in bonis monilibus for mobilibus. 4. In Paſch. 2. Come in and joyn Iſſue, and Ven. Fac. after a third Comes in, and Iſſue joyned, and nothing ſaid of the former Ven. Fac. and ſo a diſcontinuance. Mr. Attorny Jones for the King, this Court may Impriſon for two Years: alſo though this be Contra formam Statuti, yet this is not confined to this Statute, eſpecially if Repealed, but is puniſhable as Riot, and here is no recital of the Satute 4 & 5 Ph. and Mar. Cap. 8. §. nor particular offence ſpecified, ſo may be on any clauſe. 2. She is ſaid under 16, ſo is a Woman Child; and whither Widow or not is under protection of this Law. 3. The Ven. Fa. as to the ſecond is Returned Vicecomes non miſit Breve, which is there-

by

by at an end. 4. On Bakers Case, notwithstanding the Statute 4 & 5 Ph. and Mar. Cap. 8. be repealed as to the Fine, yet an Information lieth for the contempt against the Prohibitory part. Twisden conceived this an offence at Common-Law, and B. R. not excluded, it was except that Distringas is in placito de transgr. & quibusdam contempt' Contra formam Statuti de famellis preripiendum, which cannot be applied to Riot. Wild Justice, that the two Years Imprisonment cannot be in B. R. but Fine may. 2. It was said that the Defendant existens 14 Years (which is intended at the time of Information) viz. 5th of April, 27 Car. 2. did the offence, which is ill, per Curiam, as Mors and Ventris Entry into House with force, existens tenementum not said when. Sed adjornatur. 715. pl. 6.

Astrey *and* Ballard. *Trin.* 28 *Car.* II. Rot. 1130.

IN Trover the Defendant Justified by Lease of the Lands wherein &c. with all Mines, Profits, Emoluments, &c. and if this passeth Mines not open was the question on Special Verdict. Symson for the Plaintiff, on 2 Roll. 816. Wast, and 1 Inst. 53. b. and Wast 82. conceived that Mines shut do not pass by Lease of the Lands alone, therefore as to the Mines it would be fruitless without it pass Mines shut, and 3 Cr. 683. mentions not this point, nor 22 Ed. 4. 8. but 17 Ed. 3. 7. is that by the general words all Profits Mines shut may pass. Sed adjornatur. (45) Leases.

Lunn *and* Soles. Ante.

HOlt notwithstanding 2 Cr. conceived this a void award, by the excepting the Lands in Essex, and all Suits Actions, &c. concerning the same until Mich. next out of Release to be made by the Plaintiff, because in the Replication, though it be said to be made de & super premissis, yet it appears by it self that it is not so, sed non allocatur, for perhaps there was no controversie concerning the Lands in Essex, or this was never submitted; and it appears that mutual Releases are to be to end all suits depending, therefore this shall not be intended depending unless shewed. And Judgment for the Plaintiff. (46) Arbitrement.

Administors of Calthorp *against* Waymans.
Friday, November. 24.

(47) Trades. IN Action upon the Case by Patentee of Engine, viz. a Mill to Saw and Polish Marble for 14 Years, on 21 Jac. Cap. 3. §. 6. as the first inventor, against the Defendant for setting up and working with another like Engine; it appeared in Evidence to a Jury at Bar, that the fashion came out of Holland, and was there used above Fifty Years since, but never before used in England, & per Curiam, Wild Justice absent, this is the first invention within this Statute: so of Printing and Blanching Barly, and Sawing Timber with a Mill, and its not material, though it vary in some Circumstances so it be the same in the main, nor is it material that it was used beyond Sea, if it were not here known nor used before; and Verdict for the Plaintiff, and 200 l. damages. But it was said at Bar by some that this Action of the Case lieth not by the Kings Patentee.

Day *against* Garely.

(48) Administrator. HOlt excepted in arrest of Judgment in Assumpsit against the Defendant as Administrator of who was debtor to the Plaintiff, on consideration if the Defendant took Administration to the debtor, he would pay the Plaintiff, is void, and not sufficient to charge the Defendant de bonis propriis, and so is 1 Roll. Abr. 24. §. 32. which the Court agreed. And Judgment quod nil Capiat per Billam.

Jones *and* Bolton. *Saturday*, November 25.

(49) Bankrupt. DEbt on Obligation; on Oyer, the Defendant Protestando that this debt was not assigned by Commissioners of Bankrupsie of Holt, for Plea, that this was not due to the Plaintiff, & aliis Creditoribus of Holt; to which the Plaintiff replied it was so due, and the Defendant demurred especially as double: And Twisden Justice conceived the Replication ill, and that the assignment to the Plaintiff should be

be shewed, that being traversable as well as the Bankruptie. Sed adjornatur.

Moor *and* Finch.

DEbt on Obligation, conditioned to appear before the Kings Majesty at Westminster, &c. to answer to a plea of Trespass of ac etiam Billæ. The Defendant on Oyer pleaded 23 H 6. Cap. 10. and that this is void. Gold contra, on Rod and Evans Trin. 25 Car. 2. Rot. 323. condition to appear prox. post purificat. was intended the Feast day. 2. The ac etiam Billæ must be intended of the same Ashley: Twisden Justice, that this is alia forma substantially, which the Court, Wild absente, agreed. Sed adjornatur. (50) Sheriffs.

Warwick *and* Braddon.

ERror of Judgment in Replevin in C. B. Sanders on 1 Cr. 441. prated Judgment might be affirmed, the Avowry being for Rent by grant of Cestui que use in Reversion without shewing the deed of Lease and Release made by J. S. to the Reversioner. Jones Justice, & Curia accordingly, on Corbets Case, 2 Cr. the deed belonging to the Feoffees, which Twisden Justice also greed, and Judgment affirmed. Nisi. (51) Rent.

Welch *and* Baden. Ante. 707. pl. 41.

DEbt on Obligation, on Oyer it appeared to be that the Defendant deputy Customer received half fees. The Defendant pleaded this was by agreement for the Officer to pay so much. The Plaintiff replieth that the said agreement was that the Defendant should be deputy, and he have one half of the fees, and the Plaintiff the other; to which the Defendant demurred. 1. Because this is void by 5 & 6 Ed. 6. Cap. 8. And 2. because the Plaintiff hath not traversed the general agreement alledged by the Defendant: To which Twisden Justice agreed, but by Jones the former being but part of the latter agreement, there needs no Traverse of aliter vel alio modo. Rainsford Chief Justice, The Plaintiff might have taken Issue on the agreement alledged in Bar. Sed adjornatur. (52) Fees.

Butcher *and* Reve. Hill. 27 & 28 *Car.* II. Rot. 107.

(53) Assets. IN debt on Obligation, the Defendant pleaded other Bonds, ultra quod non habet nec habuit tempore exhibitionis Billæ, no Assets; not saying nec unquam Postea, which per Curiam, on 2 Cr. 132. is ill: and Judgment for the Plaintiff, for non habet is intended at the time of the plea which is after Imparlance, and nec habuit, at the time of the Bill, is no answer, but he might have after the Bill and before the plea, and have Alienes them, and so had nothing at the plea, &c.

Cordinglee *and* England.

(54) Covenant. IN Covenant on Mortgage by the Defendant to the Plaintiff, to pay so much Seven year hence, and so much yearly Mesne of Lands in Lease to J. S. Breach was assigned, that the Defendant had no Estate to Convey; The Defendant on Oyer of Indenture pleaded that J. S. was Tenant for life, and that the Defendat was seised in fee of the Reversion in fee sufficient to Convey; to which the Plaintiff demurred, & per Curiam, the Indenture of Mortgage is no Estople, to say the Defendant had no Estate in Covenant, but in debt for Rent, &c. it is. Sed adjornatur.

Stretchly *and* Vermuden.

(55) Covenant. COvenant upon the procurement of A. and B. Executors of J. S. to release, &c. the Plaintiff avers that A. died and B. Survived, and that B. releast and discharged the Defendant, and yet he had not assured; to which the Defendant demurred, because this discharge must be on procurement of both, and by one is not sufficient. Sed adjornatur.

Brown *and* Wait. Ante. *Monday*, November 27.

(56) Treason. RAinsford Chief Justice delivered the opinion of the Court, being all agreed. 1. That the Estate tail is forfeited by 13 Car. 2. Cap. 15. the ground of the doubt arising, because before W. 2. Cap. 1. it was fee conditional forfeitable, or to be charged post prolem suscitat', and that finis ipso Jure

sit

sit nullus a perpetuity was setled so that the Tenant in tail could not forfeit, but Perpetuities being never favoured, but endeavoured to be suppressed, and 12 Ed. 4. Colthorps Case, Tenant in tail had power to suffer Recovery by implicit exception of this kind of Conveyance, and 4 H. 7. Cap. 24. and on 32 H. 8. Cap. Tenant in tail had power to Bar Issue by Fine, yet could not forfeit until 26 H. 8. Cap. 13. which is only in case of Attainder, but since, 23 H. 8. Cap. and 5 Ed. 6. Cap. the forfeiture is made in Case of Treason to subject the Entail as by Fine, whence for the time alledged in this Statute 13 Car. 2. Cap. 15. on which 12 Car. 2. Cap. 30. a perpetual Band is set to all Posterities, natis natorum, &c. and being natural is to be expounded largest against the offender, and this is comprehended within the words other things that refer to the Lands, and so include tail. 2. Tail is now subject to forfeiture, and to be directed in case of Treason by 26 H. 8. Cap. these persons being lookt on in pari gradu, with persons attaint, as by §. 3. appears in 13 Car. 2. Cap. 15. Also 3. the Offenders were dead, so there could be no benefit of forfeiture to the Crown during their lives, and so would make great noise without effect, unless such a construction as this be made. 4. It appears by 13 Car. 2. Cap. 15. that it was intended the Children of the Offenders should have no benefit: The Wives Children and Heirs of the Offenders being excepted §. and this Entail is suspitious to be made with prospect to this fact, there being a former Entail; and a new Fine levied by the Offender, which reserves Power to make Leases for any number of Years determinable on any lives, with Rent or without. 5. In 13 Car. 2. Cap. 15. §. 3. all Conveyances by the Offenders for value are saved, and hereby Fines are included, whereby tail was lookt on as forfeitable hereby; and the derivative Estate must needs be forfeited by this proviso to save Purchasors: The great Objection 1 Inst. 130. Trudgeons Case, is but of general words that take not away the Statute of 13 Ed. 1. Cap. 1. and at this time tails were under the protection of the Statute of W. 2. Cap. 1. and not forfeitable, and was on Statute before 12 Ed. 4. but since Entails are weakened, and by later Statutes the Law is altered, and the perpetuity is taken off, which was not so 13 R. 2. Cap. 2. and in 4 Co. Adams and Lamberts Case, Tail was held forfeited by 1 Ed. 6. Cap. 14. by general words to maintain a Priest forever, because the intent was to forfeit forever, and was to root out superstitions uses and the words of forfeiture in 13 Car. 2. Cap. 15. are larger; and superstitious uses is not so great an offence in our Law as this

this of Treason, and upon construction of 13 Car. 2. Cap. 15. the intent appears more clear to forfeit the Tail, therefore without particular words construction may be fairly made to forfeit the Entail: but as to the second point they considered it not coming not under debate. And Judgment for the Defendant.

Dominus Rex and Jay.

(57) Mandamus. OFfly excepted to Mandamus to Aye for Alderman, Returned that the Defendant said Bailiff Flower is a Knave, and ought to be Posted for a Knave all over the Country; that no words are sufficient to disfranchise, and on 2 Cr. 506. and Roll. 79. and Baggs Case, Co. prayed restitution. Twisden Justice, Oath cannot be imposed by By-Law: Also its not said wherein he was a Knave, but as to another, that is returned to have resigned, there can be no restitution, & Adjornatur; afterwards he was restored.

Dominus Rex and Norton.

(58) Ordinary. SArjeant Pemberton on 2 Inst. 616. and 1 Roll. 136. Foxes Case, prayed Prohibition upon citation to answer de quibusdam articulis, not said Tangent. such or such a matter: Sed non allocatur, By Rainsford Chief Justice and Twisden; but by Jones Justice Prohibition was granted in C. B. on such general Citation, because the party is not bound to appear unless the cause appear in the citation: But Wild Justice absent, Adjornatur.

Butler *and* Husler.

(59) Error. ON Motion against the Defendant Sheriff of Suffolk, for taking a Guiny in part of 30 s. which was 2 s. for every one named in the Capias, on Action tam quam, there being only one 2 s. due, the Court made him return two Guinies to the Plaintiff, being double of what he had taken, on 3 Ed. 1. Cap. 26. and thereupon discharged him of Imprisonment.

Dominus

Dominus Rex and Moor. Ante. 708. pl. 44.

JOnes Justice conceived this within the general Prohibitory clause of the Statute of 4 & 5 Ph. and Mar. Cap. 8. §. 2. and as on 35 Eliz. Cap. 2. the age sufficiently averred. And by Twisden Justice, this should be traversed by the Defendant, and existens is sufficient, as on Custom of London to devise in Mortmain existens, Freeman is sufficient referring only to the quality of the person. 3. This is malum in se, and an offence at Common-law, but however having no negative words, this Court is not restrained, as Agar and Jackson, on Cap. Tryal to be before Justices of Assize, &c. not naming the Exchequer, yet being of matter of Revenue, they had jurisdiction; Rainsford Chief Justice accordingly in omnibus; & per Curiam, fined 500 l. &c. And by Jones Attorny where Laws inflict Penalty, certain paiment of that is sufficient in Conscience, contrary on offence against the prohibitory part of a Law. (60) Infant.

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Termino Hillarii

28 *Car.* II. in *B. R.* Anno 1676.

Tuesday, January 23.

Rainsford Ch. J. & *Wild.*
Twisden. & *Jones.*

Sands *and* Thomlinson.

(1) Covenant. IN debt on condition to perform Covenants in Indenture to pay 300 l. and repair as three shall award; breach assigned that award was made, and the Defendant had not repaired; the Defendant praieth Oyer of the Indenture, which was well, and also of the award, and sets it forth untruly, and so demurs. Saunders for the Plaintiff praied to set aside this Oyer, which per Curiam is Irregular; and if the award be not at first truly set forth, the Defendant might Traverse it, but cannot pray Oyer of any thing not in Curia prolate, & per Curiam, it was set aside.

Harvy *and* Holland. *Hill.* 27 & 28 *Car.* II. Rot. 1185. Ante.

(2) Lieu. ERror of Judgment in Saffronwalden in debt on Obligation, the Defendant pleades paiment at Furny-pelham, the Plaintiff suggests that Furny-pelham is within the Jurisdiction, & Quia the Defendant non dedicit, 1 Roll. Abr. 297. Tit. Error, the Plaintiff praieth Judgment and Error now

now assigned that Furny Pelham was not within the Jurisdiction; to which the Defendant in Error demurred. And by Holt for the Plaintiff, that he could not plead to the Jurisdiction, for the Obligation might be within the Jurisdiction, yet paiment out: Also this is here local. Saunders for the Defendant, that this is not assignable for Error, because hereby none should have Judgment on Error without tryal by Nisi Prius: Also the Plaintiff might have pleaded that Furny Pelham had been out of the Jurisdiction, and having omitted this and taken Issue on paiment he is Estopt; which Wild Justice agreed, and by Symson so is the constant practice in the City of London; and so where Oath is made that the place of paiment is out of the Jurisdiction, the Entry is Ideo sequatur ad com. legem, or else take Issue; & per Curiam, in nullo Erratum, is here no confession of the fact unless it be against the Record, and so not assignable if there were any such surmise before tryal, but if this were only a surmise made on drawing up the Record since the Writ of Error brought its well, for without this suggestion it were plain Error. Et Adjornatur.

Dominus Rex and Game.

(3) Poor.

MR. Ayers prayed to quash Indictment of the Defendant, quod vi & armis, he took away the Poors Book, ad nocumentum of the Parish and Churchwardens, being the Goods of Parishioners. Which 1. is but private injury, and so no Nulsance. 2. As Trelpass, its not good, for the Parishioners are not capable of Goods. But by Wild being vi & armis its good as Trespass, and the rest void; Twisden contra, Indictment vi & armis, stopping private way ad com. nocumentum, is ill, which the Court agreed on Roll. but being not said the goods of the Churchwardens, who have the right of suit, it was quasht.

Welch *against* Baden. *Trin.* 28 *Car.* II. *Rot.* 427.

(4) Fees.

IN debt on Obligation, condition to pay to deputy searcher of Rochester, parcel of Sandwich; on Oyer, the Defendant pleaded an agreement by the Deputy, to pay half fees to the Plaintiff, and so quoad the Office void by the Statute 5 & 6 Ed. 6. Cap. 8. The Plaintiff replieth he had power as Searcher in Sandwich to make deputy in Rochester, and that they

made the Defendant Deputy, and allowed him one half of the profits, and reserves the other to himself; to which the Defendant demurred, because the agreement in the Bar is not traversed. But per Curiam the agreements are substantially the same, as allowance of 10 l. to the Deputy for Execution, and the Deputy to give an account of Fees; but if it had been to render a Rent, or to pay a summ in gross, it were within the Statute tending to Extortion, but Sheriffs, Cirograffs, and most other Officers that make Deputies, do it to account of Fees. And Judgment for the Plaintiff, Nisi.

Bull *and* Knight. *Thursday*, Jan. 25.

(45) Taxes.

IN Trover, on not guilty, Special Verdict find 14 Car. 2. Cap. 10. that two Shillings shall be paid for every Fire-hearth not excepted; and §. 20. excepts Stamps Blowing-house, &c. 16 Car. 2. Cap. 3: the Defendant debite constitutus had power to distrain, & si super totam materiam the Fire-hearth of a Smiths-forge be not chargeable, &c. for the Plaintiff; if chargeable, for the Defendant; and Mr. Solicitor Winnington for the Defendant, That a Smiths-forge is chargeable in 14 Car. 2. Cap. 10. and so adjudged in Goffe and Lloyd by three Judges against Hales Ch. Just. who contra to rule by consent of parties took hold of imperfect pleading, for this is not within the exception of 14 Car. 2. Cap. 10. §. 20. which only enumerates some particulars, and gives no exemption in like Cases; so though Smiths use Bellows they cannot be said blowing Houses, which is appropriated to casting of Iron-works, not to Smiths; and though this be a Utensil of Trade, its as well chargeable as Bakers Ovens, and Brewers Coppers; Wild Justice said, This was a Hearth, and not included in the word Blowing-house which was put into save the Melting-houses of Tyn in Cornwall, who have also Stamps to coyn it: Et per Curiam a Smiths-forge is neither within the words nor intention of the Exception of 14 Car. 2. Cap. 10. §. 20. and no body attending for the Plaintiff, Judgment pro Rege Nisi.

Corpo-

Corporation of Ironmongers *againſt* Naylor *and* Packſton.

(6) Taxes.

TRespaſs of entring a Houſe againſt the will of the Corporation, and taking a Silver-ſalt; Upon not guilty, Special Verdict find 14 Car. 2. C. 10. & Proviſo §. 21. to charge only Occupiers dwelling in ſuch Houſes, &c. and §. 14. the Accounts to be into the Exchequer, & 16 Car. 2. Cap. 3. that ſuch as the King nominates may levy by aſſiſtance of Conſtable, that the Plaintiffs were poſſeſt of five houſes, which they reedified after the fire, and that they ſtood empty at the time of the Duty, and that the Defendant made demand of the company, and on refuſal took this Diſtreſs: Polyxphen for the Plaintiff, That this is not an Act that gives any ancient Duty to the King, and even in that Caſe the ſubject is not to be charged beyond the words of the Stat. 33. H. 8. Cap. 39. §. 26. as 7 Co. 21. Lord Anderſons Caſe, which in a large ſenſe might extend to all debts by Recogniſance, and to charge the Lands in any others poſſeſſion as well as of the Tenant in Tail, yet agreed this extends not to Recogniſance due to the King by forfeiture, but originally given to him, and though the words be charged, yet expounded to extend only to Heir of Iſſue in Tail not to his Alienee; therefore if the Statute of remedy for Ancient duty ſhall not charge the Subject a fortiori, not this new one, that is a free gift to the King, the Law regarding the Kings honour more than his Revenue, therefore ſhall not be extended by conſtruction: Alſo its in the nature of a Duty and Tax, and is always a proportion out of the Subjects benefit, and not where the Subject hath no benefit but rather loſs, as the Stat. 12 Car. 2. Cap. 24. of Tonnage and Poundage diſchargeth on loſſes; alſo the Statute of 37 H. 8. Cap. 12. §. 10. ſaves empty Houſes; and on 14 Eliz. Cap. 5. empty Houſes pay neither to Church nor Poor, becauſe they yield the Owner no advantage; the greateſt doubt reſts on 14 Car. 2. Cap. 10. that gives this Duty whenever it mentions payment, chargeth only the Occupier, as §. 6. but in the point of account they §. name the Owners alſo, giving him power to examine his own intereſt; and §. 3. the Act takes notice there may be vacant Houſes and particularized, the Owner as to account therefore is not intended within the payment; alſo the Proviſo §. 21. is ſtrong to charge the Occupier, and not the Landlord, who might have been included elſe within the former general words, and here the Owner is doubtleſs

no Occupier, which intends only such as actually take the profits, especially being here said such as dwell in the House, and the words, and not upon the Lessor, his Executors, Administrators, or Assigns do not alter the Case, it being no reason to make him pay that cannot get a Tenant, that is discharged in case his Tenant run away; also the subsequent Acts make nothing in this Case, 15 Car. 2. Cap. 13. doth not at all mention any Owners; and 16 Car. 2. Cap. 3. §. 4. is that no Owner, Occupier, or Proprietor shall be molested, which may be the same man, and §. 6. that subsequent Occupier shall be charged for one half year, never mentions Owner; and it lyeth on the Defendant to shew that the Owner ought to pay, and not on the Plaintiff to prove a negative, nor can any construction enlarge this Duty. 2. The Plaintiff cannot be charged without account or transmission into the Exchequer, else the Officer might charge the Subject at pleasure, and by this means the whole Revenue would be in danger; and 14 Car. 2. Cap. 10. §. 5. takes care that Returns be made into the Exchequer, else the Exchequer can never take any payments of the Revenue; and 15 Car. 2. Cap. 13. §. 3. adds penalty to Officers that make not true account; and 16 Car. 2. Cap. 3. §. 9. is for payment into the Exchequer, never intending the Officer should collect what he pleased; the Justices were therefore to supervise the Accounts returned into the Exchequer, that the Subject might not be injured, surely meant the Subject should not be distrained before such Account made, and this being a charge of Inheritance was intended to come into the Exchequer, because without record the King cannot take nor give, and payment may be into the Exchequer, and not to the Officers that gather, and otherwise if the Officer return five and received five to himself, there were no remedy: Holt for the Defendant, That the Duty is payable for emptie Houses on 14 Car. 2. Cap. 10. being included within the general words of the Gift, and not excluded by the Proviso §. 21. which would have compelled Occupiers to account as well as Owner, unless it intended both chargeable, and the Officers have power to enter into empty Houses, but not into any not chargeable, therefore the empty Houses are chargeable; and the Proviso §. 21. is of a House tenanted, which cannot extend to empty Houses, being not intended to discharge any House, but to discharge the person of the Owner, and lay it on the Occupier as Parish charges, or a Modus Decimandi which on default of Tenant shall be paid by Landlord, and the Landlord is not discharged but only during his Demise, and doth not charge

charge the Occupier only Exclusive of the Landlord, but only where he hath a Landlord; and the Statute of 14 Car. 2. Cap. 10. intended the Duty for benefit of the Kings revenue, being pro bono publico, and the King is not to lose his Duty because the builder is disappointed of his design of gain; and 16 Car. 2. Cap. 3. §. 4. shews the Proprietors as well as Occupiers are chargeable. 2. The Duty being payable, the King hath remedy by distress before the Return into the Exchequer, Car. 2. Cap. the Duty is vested from Lady-day and returned into the Exchequer not until May after; also the Return is not to entitle but to inform the King, and if there be no Return into the Exchequer the Subject hath no injury, for if he be distrained for more than due, he need not pay it, and its no reason that for fraud in management the King shall lose his Duty; in this case the Act of Parliament is the record that vests the interest in the King, and new Chimnies are but an enlargement of profit, as an enlargement of wast, where the King hath a Rectory, is parcel of that Inheritance and no new Estate that requires a new record to entitle the King, but only a perquisite. Twisden Justice, Though the Duty be vested in the King in interest, he can have no remedy until returned into the Exchequer. Wild Justice, Albeit the Duty be given from Lady-day, yet nothing is due until Michaelmas, which is after the Return, and here being no special conclusion as in the former Case, its against the Defendant. Also its imperfect in this, that Verdict finds not here were Houses before: Rainsford Chief Justice, that Mansion Houses pay albeit empty, but doubtless the want of special conclusion if empty Houses pay for the Plaintiff, is ill. But adjornatur.

Hipsly *and* Tuck. Ante.

WArd on 2 Roll. 761. that by not taking the Sacrament he was no Mayor, and so the Judgment below Coram non Judice, and so Error: Ayers for the Defendant, that in §. of not taking the Sacrament, there is no disability of the person, yet the Officer is incapable, and the Office void by the relative words of other clauses, yet this is only as to the Officers themselves, not as to strangers which would work a wrong, in which Cases, Pl. Com. Stradlings Case, & Fulmerstons Case, & Pl. Com. Easton and Studs Case, general words have been restrained to the end and design of the Statutes, as this of 25 Car. 2. Cap. §. against Papists only, and therefore the Act only imposeth penalty on an Officer that acts after refusal, but makes not (*b*) Error.

not his acts void, especially not as to such as are to receive benefit by execution of the Office. So 3 Co. Lincoln Colledg Case, & Pl.Com. Partridges Case 1 Co. Porters Case is an answer to the Proviso in 5 & 6 Ed. 6. Cap. 8. §. that it was only to satisfie ignorant Burgesses, and the Statute had been sufficient without it. So on 13 Ed. 1. pag. 54. & 27 Ed. 3. Cap. 9. & 33 H. 8. Cap. 39. Construction is according to rules of Common Law, which alloweth Acts of Officers in fact as valid, 3 Cr. 699. Harris Case, an Officer cannot enquire into the authority of the Court without charge to the people. 2. This is not assignable for Error against the parties own admittance of record, having appeared and pleaded before the Mayor, &c. as 2 Cr. 359. Whistler and Lee, and if the Judgment be void false imprisonment lyeth, 3 Cr. 320. Raynsford Chief Justice, and Twisden, a verbis legis non est recedendum, the Judgment being after the three months cannot be made good by admittance, which Wild and Jones agreed, and that the Office shall be void is as strong as if all Acts shall be void; and notwithstanding 1 Jac. Cap. 3. and 1 Eliz. Cap. 19. & 4 H. 7. Cap. 24. & 1 H. 5. Cap. 5. that Outlawries be void are not so only against the party. So Musgraves Case on 22 & 23 Car. 2. Cap. 9. §. 113. that the Kings Duty is not paid, adjudged not assignable for Error, the Court agreed the party could not say the Mayor was not so, but here its made assignable by Parliament, which is a greater record, and Judgment reversed, Nisi.

Ricroft *and* Roberts. *Friday* Jan. 26. *Trin.* 28 Car. 2. *Rot.* 309.

Toll. (7) TRespass of taking, cutting, and spoiling so many Yards of Cloth; the Defendant justified as to taking under Sir Capell Lucking who prescribes by himself Farmor or Baily to take a reasonable summ of Merchandize for Stallage that 5 s. was a reasonable sum; to which the Plaintiff demurred, because this was not to distrain only, but to take and keep the Goods until the summ is paid. 2. Its not said what in certain, but a reasonable summ: Nor 3. shewed how 5 s. was a reasonable summ, that the Court may judg it so: But per Twisden Justice, the Prescript for reasonable summ is as sufficient as for Fine of Copyhold without shewing what summ, for this is issuable, but the justification of the taking at the place agreed, and carrying to another out of the County should

should be traversed, and Judgment for the Defendant, Nisi, for it cannot be said quod est eadem.

Astree *and* Ballard.

IN Trover of Coles, Special Verdict find sale of Mannor then in lease to the Defendant, wherein were Mines open and shut, and if the Lessee may dig in unopen Mines, then for the Defendant, else for the Plaintiff: Serjeant Pemberton for the Plaintiff, That the Mines are only recited to be in the Fine and sale of the Mannor, and are not in the words of demise to the Defendant, but the demise is of the Premises only, which is only as of the Appurtenances; but however its reasonable that by Lease of Mines new ones should not pass, there being others to satisfie, as on demise of Land with the Timber, Trees, nothing of the Timber passeth, as Co. Lyfords Case, and yet they would pass alone, so Dyer that mens inheritance shall not be destroyed by general words; but if there were no Mines open the Lessee may open, as 1 Inst. 54. & 5 Co. 12. and if the words may be satisfied, otherwise the Lessee shall not open Mines, and this is suitable to the most common intendment, and it had been easie to express the Grant of Mines open and unopen: Twisden Justice, That the Lord Cooks opinion is as good as Fitzherberts, or Dr. and St. and not so easily opposed as denied, also though in a recovery Mines may pass by general words, yet in a Lease there must be special words; but by Jones the Recovery being of all Mines open and unopen, yet the Lease is de terra & omnibus premissis belonging to the Mannor only, so it cannot open new Mines, which Rainsford Chief Justice agreed. And Judgment for the Plaintiff, Nisi. (8) Leases.

Stretchy *and* Vermuden. Ante. 196 pl. 55.

IN Covenant by the Defendant being imprisoned at the Suit of Abbot and Hoblin Executors of Lamot to assure Lands in forty days after the Plaintiff procured his liberty of the Executors; and an agreement and composition as at the agreement, Abbot died, after which Hoblin the survivor procured his liberty, yet the Defendant had not paid. To which the Defendant demured; and by Wilmot Serjeant for the Defendant, that by death of one Executor the Covenant is discharged, (9) Executors.

charged, being before the liberty procured, as Bendlos 8. and 13 H. 7. 13. the procurement of liberty being a condition precedent, 45 Ed. 3. 5. as surviving Executors at Common Law could not sell. 2. The Plaintiff hath alledged only the procurement of liberty, not saying Coment that the Court may adjudg it sufficient, so 22 Ed. 4. 4. to discharge Annuity. 3. It was to procure an agreement and composition, such as the parties should agree, and its averred the Plaintiff procured an agreement, but not said he procured a Composition: Serjeant Barwell for the Plaintiff, That the Covenant is well performed by the Plaintiff, the Defendant having as much advantage, and his liberty as effectual from the survivor as by both Executors; but if both had been alive, albeit one might have discharged, it had been no good discharge, because then it were possible for both to do, but now its become impossible for both to do it, and its as near performed as can be; so 1 Inst. 219. Also 2. the Plaintiffs Averment is suitable to the Covenant, and being only to entitle to shew a breach and no breach alledged in the not agreeing, its well enough: Twisden Justice, This is not the case of a condition to infeoff, nor of an authority, as that Executors may sell, yet in this case two of three Executors may sell, and here the substance is performed, 8 Co. Bradshaws Case, and he needed not to say how he procured his liberty, but per procurationem, is sufficiently pursuant to the words of the Covenant: Justice Jones excepted that breach is alledged in not conveying forty five Acres in quadam Pastura vocat' Berre near Ramsey, and the Covenant is to convey forty five Arres in Villa de Berry. 2. The breach is in not paying in forty days after discharge out of Prison, not saying in forty days after the agreement. 3. The agreement should be shewed, and also the parties agreement to such agreement, which the Court agreed; and Wild Justice absente, Judgment for the Defendant, Nisi.

Dominus Rex and Helder. *Saturday,* January 27.

(10) London.

IN a Quo Warranto against the City of London for claiming Royal Fines, they disclaim therein, but claim Fines of Justices of Ni. Pri. on Trials in London, whither Coram Rege in Chancery B.R. C.B. or Exchequer, and if hereby they shall have Fines set in B. R. on confession of Indictment there of Riot laid in London, or on Verdict by Nisi Prius there as in the Brewers Case, and the Case of Major Bill fined 200 l. in B.R.

B. R. last Term was the Question, and the Court conceived that hereby is meant only Fines, on Contempt, or on Jurors at Nisi Prius, and what are set in London, not what are set in B. R. after Trials there, or on Confessions in B. R. &c. Et adjornatur.

Abraham *and* Cunningham. *Mich.* 27. Car. II. *Rot.* 664.

IN Ejectment Special Verdict find Sir D. C. possessed of a term who made another Sir D. C. his Executor, and the Executor 1663 makes another C. D. and Hayes his Executors, after which C. D. dieth, and Bradborn 1665 takes administration to the first Testator, and assigned to Lovelace the Lessor of the Plaintiff, after which Hay comes into Court and renounceth his Executorship, after which Bradborn is cited, and his Administration revoked, and new Administration committed to the Defendant of the first Testator. Saunders for the Plaintiff admitted that Administration is void if there be an Executor, as Pl. Com. but here the Case is only that a Will being concealed, Administration is committed, and upon notice of it the Executor before probate comes in and renounceth on death of the Executor, the first Testator died Intestate, especially if Hays had immediately after renounced, and Pl. Com. Gresbrooks, but 7 Ed. 4. 12. Administration is good until the Will be proved, at least if there be no Will ever proved; and the reason of avoiding the Administration ab initio, is by the Statute 21 H. 8. Cap. 5. because there cannot be both Executor and Administrator, therefore the Testators Will shall stand; but here is no Executor in Dunmore and Clerks Case, 5 Co. 29. though a Will be made yet Administration without the Testam. annexo is good until an Executor appear, or the Will be proved, and there was nothing could restrain the Administration but the Executors proving the Will; for the inconvenience would be great if after seven years Administration by the principal Creditor, and payment by him of the rest, and the Executors refusal that a stranger should come in to avoid this Administration, for by this means for fear of future Executors no debts would be paid, & relatio est fictio Juris made for equity only, and by the refusal the Executors being ab initio no Executors, the Administration shall not be avoid ab initio, Dyer. 372. Isteds Case, until probat he is no full Executor, and the Executor of Hays after refusal cannot be said Executor to the first Testator; also an (11) Executors.

Executor of his own wrong possest of a term is lyable to execution of the Creditor notwithstanding a rightful one named; a fortiori an Administrator, and the Administrator is lyable to the Suit of the Executor, but not the Creditor that recovers and hath execution of the term, so neither shall the Assignee of the Administrator be lyable unless there be an Executor that proves the Will. Levins for the Defendant, The single question is, If the Administration were ever good, or sale of term by him, there being then an Executor in being; its agreed that the Executor of the Executor is the Executor of the first Testator, and therefore 1. the Administration committed by the Ordinary is void, as Co. Henfloes Case, whither power or interest which its plain he derived from the King, and could dispose only of Goods in possession, but could not sue nor be sued, which was remedied by 3 Ed. 1. W. 1. Cap. 19. which made the Ordinary lyable, and 31 Ed. 3. Cap. 3. enables the Ordinary to make an Administrator that may have debt, but the Ordinary at this day cannot sue for the debts; and while there is an Executor in being the Ordinary hath no power to commit Administration, as Trin. 4 H. 7. 10. without Citation especially; and 21 H. 8. Cap. 5. §. 3. puts all out of question, that when Executors refuse then the Ordinary shall commit Administration, but if there be an Executor in being he hath no power: And 2. as to the interest of the Executor its impossible, for the Goods are all immediately vested in the Executor; and albeit he cannot sue before Probate, yet 5 Co. Middletons Case, he may release before, and without ever going to the Ordinary, and the Executors sale is good against any Administrator committed by the Ordinary; and 36 H. 6. 7. rules this Case, that albeit the Executor never proves the Will, yet the administrator can have nothing by the Executors after refusal, but he ought not to be admitted to refuse after intermedling, but yet this doth not defeat his interest ab initio, and this after renunciation cannot make the administration which is void, good, as 10 Co. 62. & 3 Co. Butler and Bakers Case on the like Statutes, the Powers being not pursued at the time when executed shall not be made good by relation, so 36 H. 6. 7. it shall relate for recovery and punishment of Trespasses from time of the Testator, but not to all purposes, for if after release Administration be committed it shall not relate, and had the Will been proved, there would be the same inconvenience, and here the term was not to commence until 1671, and the Administration was committed to Bradborn seven years before the term began, which he sold to Lovelace, revera, after Administration taken

taken by the Defendant to the Executor of the Executor, that should have been to the first Testator; want of notice will excuse the Ordinary, but not enable the Administrator: and by Mr. Attorny Jones for the Defendant, The Executor might have acted, and it would be great confusion to have power in both on foot together; also the relation of the Administration would not make good a Grant of a term before; and had not the Will been concealed the Renunciation would have been had precedent to the Administration, and its the same where concealed: Twisden Justice, The Renunciation cannot give authority to him that had none; and he is Executor of his own wrong of the term, which though doubted in Porters Case, yet hath of latter time been held he may by occupation; and relation shall not give the Administrator power that had none at Common Law, and the Testator dieth Intestate only from the time of the Renunciation; and in 6 Car. 1. adjudged that if there were a Will though started up many years after Administration, its void without more, whither Executor Administer, or renounce; which the Court agreed. And though Administration may be committed pendente lite of the Will, yet that is only to preserve perishable Goods, not to grant any term: But Wild absente adjornatur.

Wise *and* Creek. *Wednesday*, January 31.

Serjeant Crook on 13 Ed. 1. St.--- pag. 55. excepted against Prohibition on Custom to be discharged of repair of Mother-Church, by reason of repairing the Chappel of Boddigtot, that hath Sacraments and other Rights Parochial, but have Sepulture in the Mother-Church, Hob. 66. & 1 Roll. in the Case of Aston, no Prohibition was Granted; and 2 Roll. tit. Prohibit. 290. it was denied; and Pennyland and Tawyer, 11 Car. 1. a Consultation on the like prescription; for the Chappel remains still part of the Parish, and this is meerly of Ecclesiastical cognisance, therefore without recompence to the Mother-Church no Prohibition ought to be on such Custom. Levins contra, on Pasch. 26 Car. 2. Brown and Palfryman, that this Custom being different from what is used in Spiritual Court, ought to be traversed, and having nothing but Sepulture in the Mother-Church, but the least Custom to repair the Isle, or keep one of the Bells of the Mother-Church were sufficient, and though there never was any Tax made before, yet (13) Church.

yet by Rainsford Chief Justice, and Twisden Justice, a Prohibition was granted, the others being absent. Post.

Hingly *and* Saunders.

(13) Way. TRespass of entring a Close and pulling down, and carrying away Posts, &c. As to the Posts, on not guilty, and justification of entry for a way found against the Defendant, and damages 1 d. and Judgment, the Defendant assigned for Error that it was not said ad valentiam, which as to Chattels distinct from Freehold ought to be; sed non allocatur, for per Curiam, this is but form and aided by 21 Jac. Cap. 13 Cr. and Judgment affirmed.

Darrell *and* Withers. Ante. *Trin.* 28. Car. II. *Rot.* 141.

(14) Tythes. TRespass of taking forty Cart-load of Hay in Kingsclere: The Defendant pleads that the Hay grew in D. and that the Tythes thereof belong to the Vicar, and the Defendant as servant, &c. The Plaintiff replies that these were growing on other lands in Kingsclere, absque hoc that they grew in D. the Lands alledged by the Defendant: To which the Defendant rejoins that his grew in D. absque hoc it grew in the Plaintiffs Land, because this being but a common Bar the new assignment had been sufficient in replication, and the traverse is void; which Twisden Justice agreed, and so is the Rejoinder; but parties agreed to pay 40 s. and pleaded Not Guilty for the rest.

Dominus Rex and Smith.

(15) Religion. ON Habeas Corpus it appeared by the Warrant of two Justices that he was committed on refusal of Oath of Abjuration of Covenant, being taken Preaching within five miles of St. Clements where he formerly lived. Buck excepted that by 17 Car. 2. Cap. 2. §. 5. N. 1. that Justices were not authorized to give Oath to the offender, but only to Witnesses; sed non allocatur, the Act being that on refusal of the Oath they shall commit, implied it gives them power to administer an Oath. 2. It was not said he came within five miles of Corporation after he Preacht; sed non allocatur, being taken Preaching within five miles its sufficient, else he might Preach, and so remain

remain in that place and never remove, and then could not be said to come within five miles, &c. 3. The party offered to submit and take the Oaths; sed non allocatur, being in Execution until the six months; and he was remanded.

Rockley *and* ——— *Thursday*, February 1.

BRitland prayed Costs for not proceeding in Writ of Enquiry of damages taken after Reversal of Outlawry, for want of restitution by special Writ, being put to 10 l. charge, travelling from Yorkshire hither to attend; sed non allocatur, being never granted on Writ of Enquiry. (16) Costs.

Tomlin *and* Adler.

POlyxphen prayed Prohibition to the Archdeacon of in Yorkshire, on denial of Custom, on libel against a Chappel of Ease, for a third part of repairs of the Mother-Church, which was granted, per Curiam. (17) Church.

Finch *and* Pley.

LEvins excepted against Judgment against a casual Ejector, and prayed that he might not plead to the Declaration of Mich. Term, on Lease of the Bishop of Worcester made this January, Habendum from 20th of Octob. last, which per Curiam is ill, and Judgment staied; but this is a good declaration of this Term by new delivery, and the title actrewing on the death of the Countess of Manchester in December last, though of course declaration is always of that Term when the Tenant appears, which was but this Term; yet Judgment staied. (18) Ejectment.

Crispe *and* Withers. *Saturday*, February 3.

IN debt by the Plaintiff and seven others severally for 100 l. &c. against the Defendant Executor of Mason, on Devastavit. Polyxphen prayed time to plead, being yet doubtful (19) Executors.

ful what to plead, being all Actions Commenced at the same time, and the Defendant having but one 100 l. Assets, and might by mispleading be liable to 800 l. which the Court granted. Nisi.

Smith *and* Tracy. *Pasch.* 28 Car. II. *Rot.* 533. Ante.

(20) Ordinary.

IN Prohibition on Libel for distribution by Brothers and Sister of the half blood, against the Brother of the whole, Holt plaied a Consultation being in Equali Gradu, and by the Common and Civil-law as much esteemed, and this shall be determined according to the Ecclesiastical-Law, our Law being not contrary, and this no new power, but as 9 Co. Hensloes Case, a reviver of the ancient power of the Ordinary, which by consequence of 31 Ed. 3. Cap. 11. and 21 H. 8. Cap. 5. is taken away, which is the reason of Hob. Slavnyes Case, and 1 Cr. Fotherbyes Case, and 1 Cr. Levins Case, and 3 Cr. Swan and Gatelyes Case, Brother of half Blood shall be Guardian before Uncle of the whole, and Administration is not guided by the Rules of discent, but as Co. goeth to the Mother, Ratcliffs Case; and the words of 22 & 23 Cr. 2 Cap. 10. §. 3. are strong in this point; for the Common-Law being silent this must refer to the Civil-law that was then used. Therefore Winnington Silicitor, who Read on this Statute, for the Defendant agreed, that before this Act the half Blood was not regarded, as Sir G. Sands Case, but this Statute Car. 2. Cap. changeth the Law, being to be expounded by the Judges of the Common-law, who have no other rule to Judge by but the Common-Law, as if Bastard eign & Mulier puisne were, this Court will Judge according to our Law, and not according to the Civil Law, by which both are equally legal, as Dyer pl. Isteds Case, on 21 H.8. Cap. 5. that Residuary legatee shall have Administration before the next of Kin, because our Law imitates the intent and mind of the devisor, and here the mind of the party naturally prefers the whole Blood before the half Blood; and Administration was Originally in the Temporal Courts, and delegated by Princes to the Spiritual Courts care, but no new Law was given to them to Judge by Bendloes, 133 Prohibition. Roll. 303. also legal representatives must be such as in our Law are legal. Twisden Justice, That the construction of the Act is not in the Spiritual Court, but the Common-

mon Law must expound what is legal, according to the intent of the Act, and it hath been resolved by Delegates that the whole Blood shall be preferred in Browns Case, 8 Car. 1. but Stiles 74. pl. contra; and in C. B. by three Justices against Ellis, the Prohibition was denied in this Case, therefore he doubted. Et adjornatur.

Kent *and* Hartpoole. *Pasch.* 27 Car. II. *Rot.* 468.

ERror of Judgment in Ejectment in Ireland, Special Verdict find Robert H. seised, and by fine settled to himself for life, Remainder to A. H. Remainder to G. Remainder to W. H. &c. that W. H. was born Jan. 1649 that A. H. and G. H. were dead without Issue, and by act of Parliament, 14 Car. 2. Cap. the Lands of W. H. was vested in the King for Rebellion from October 1641. provided not to extend to right of any Innocent, &c. they find the Kings Letter and Instructions pursuant of that Act, and 17 Car. 1. Cap. of restoration, and that R. H. the Grandfather, and W. H. the Father of the Defendant were Nocent, &c. and that the Defendant R. H. was Innocent, and of Innocent Parents: That Sir Oliver Saint-John by Patent of these Lands entred, and after the Defendant entred upon him, And if the Entry of Kent lessee of St. John be lawful, for the Plaintiff: And after Judgment for the Plaintiff below, Saunders for the Plaintiff in Error. 1. If by the death of R. H. the Grandfather before the Contingent Remainder to the first Son of William H. be by discent of that Reversion destroyed at Common-Law, and if not, then if the relation of the Act 14 Car. 2. Cap. it shall as to 17 Car. 1. Cap. if the lessor of the Plaintiff had a title before his Patent, the King was deceived, and he could not be entitled by that Act, not pretending to any Ordinance of Lords and Commons, &c. and its not found that W. H. or his Son, the Defendant was guilty of the Rebellion within the Act of 17 Car. 2. Cap. but only within the Act of settlement in Ireland, both which are general Laws, and 17 Car. 1. Cap. is not found. 2. That the Contingent Remainder is not destroyed, as where Tenant for life, 3 Cr. 815. Cordels Case; but by Rainsford 2 Cr. 221. Wood and Ingersoles Case, and 11 Co. Lewis Bowls Case, and Co. Chudlies Case are express, that the Contingent is destroyed. And by Twisden Justice it was never the intent of the Statute 27 H. 8. Cap. 10. to preserve such Contingents

(21) Assurances.

But

But by Saunders, this is not within the rules of Perpetuity, here being no act of the party, but only the Act of Law, as where Inheritance discends to Administrator or Executor of Term, but 1 Cr. 54. if Executor of Term purchaseth the Inheritance, it shall be drowned, 1 Inst. 33. a Contingent Remainder may take effect, albeit the Inheritance be joyned to Tenancy for life, if the parties do no act themselves to destroy it, nor is this any inconvenience. But by Twisden Justice, act of Law or of the party is all one in this Case, if the Contingent do not happen in due time its destroyed, and this was the Point of the Judgment in 1 Co. Chudlyes case, and 11 Co. Lewis Bowels Case put the difference where the Estates are several, and where united. And by Rainsford Chief Justice, who was Commissioner in Ireland, it was found that R. H. the Grandfather, and W. H. the Father were Nocent, but R. H. the Son an Infant was found Innocent, so whatever right he hath, is not forfeited; and the only question was on relation of the Act, 17 Car. 1. Cap. and nothing of this discent moved there, but only whither, notwithstanding the forfeit of the Estate for life of William H. it were not yet in being as to this intent to preserve the Remainder to R. H. the Son: And Rainsford conceived then that it was sufficiently in being to preserve the Remainder, and if this Act of 17 Car. 1 Cap. be the guide, and not the act of settlement in Ireland it will shake all the Patents in Ireland. Which Twisden Justice agreed; Saunders conceived that the Act of settlement relates only to avoid incumbrances and mean Conveiances, not to give the King a title. But per Curiam, by the relation the Estates for life, and the Reversion of R. H. the Grandfather, and W. H. the Father are vested in the King, and by consequece the Estate for life is drowned, and the Contingent destroyed by the Kings grant; but had the Estate of William H. been forfeited to the King and not disturbed by him, it will preserve the Remainder to after born Son. Symson for the Defendant in the Writ of Error, that the Grandfather R. H. died before the Birth of R. H. the Grandchild, whereby W. H. the Father was Tenant for life, Remainder in fee and so no particular Estate to support the Remainder, and the operation of Law in this case is as strong as the act of the party to destroy it. 2. The Statute 17 Car. 1. Cap. hath destroyed the Contingent in case it were not destroyed by the discent, for this vests an Inheritance in the King that cannot be subservient to the uses in the Indenture being a Corporation, and in 1 Co. Archers Case, and 1 Cr. Bellaies Case; Constructions have been enlarged to

to destroy such remote Contingents, and Moor 374. pl. Sir J. Perrots Case, and in Pigots Case, and Moor 815. pl. is an authority in point. 3. The Statutes of 14 Car. 2. Cap. nor 17 Car. 1. Cap. have no destructive Clauses, but, yet its as true that neither of those Acts revive the Contingent if it be destroyed: Et per Curiam, Judgment affirmed, Nisi.

Dominus Rex and Newton. *Monday*, February 5.

(22) Error.

SPecial Verdict in Information against the Mayor of Grimsby, for not taking the Oaths and Sacrament according to 25 Car. 2. Cap. 2. §. 5. find that within the three months there was a Sessions at Lindsey, which was within the County, but not at Grimsby where he was Mayor. And by Saunders for the Plaintiff, albeit no Sessions were at G. yet not having received the Sacrament he could not swear, and the Defendant being Mayor might put off the Sessions of G. so ought to take it within the County. Leeke for the Defendant; Its found that the Defendant was a Justice of Peace, and had taken the Oaths and Sacrament, and subscribed the declaration, &c. 1672, but that when he was Elected Mayor 1674, he took none being no Sessions at G. but after the three months; and the next Sessions at G. did take them; and the Act doth not require a second taking on Election to be Mayor and Justice, having by taking it before and after sufficiently testified his Obedience. 2. Its not sufficiently found that the Mayor is an Office or Place of Trust under the King, nor that Grimsby is Incorporate by Charter or Prescription; and to this the Court inclined. Sed adjornatur.

Smith *and* Abell. *Tuesday*, February 6. Ante.

(23) Fines.

POlyxphen excepted to Verdict which find William Abell seised of Lands in his own possession, and of B. and the Declaration is but for one Messuage, and the settlement is of two severally, and it doth not appear which of them; one to the daughter for life, &c. the other to the Son, &c. whose Son is Lessor of the Plaintiff. Newdigate contra, that the Fine is found to be of the Lands in question, under which the lessor of the Plaintiff claims as forfeiture, on 1 Inst. 252. and 1 Co. Bredons Case, and 1 Leonard 51. Braybrooks Case, and Dyer 359. and 1 H. 7. 12. Dyer 148. and

2 Roll. on a being levied by Tenant for life to Remainder for life; which the Court agreed, had the daughter levied the Fine, but the Fine being levied by the Mother who had both for life, to the daughter who had only one in Remainder, its incertain of which, and therefore Ven. Fac. de novo, Nili, &c.

Dominus Rex and Holt. *Wednesday,* February 7. Ante.

(24) Mandamus. MR. Attorny Jones praied the opinion of the Court, the Writ of Mandamus and Return agreeing in name of Mayor and Capital Burgesses, and though it appear in the Return that they were incorporated by name of Mayor, Bailiffs and Capital Burgesses; yet the power of putting out being in the Mayor and Capital Burgesses its well enough. as Stiles 42. pl. But by Wild on Hob. pl. the Inheritance is in the Corporation, therefore the Writ must be to them, which the Court agreed, and that the Mayor and Capital Burgesses cannot restore, albeit they may Elect and Turn out: Also per Curiam, being to continue but Durante bene placito, the Corporation declaring their Will under Seal may turn him out without cause; & per Curiam he may take a new Writ to the Corporation, but they refused to restore.

Miles *and* Bateman. Ante.

(25) Bail. MR. Attorny conceived debt lay on the Recognizance of Bail, albeit there be no Seal of the party, and so it doth in C. B. And its no Objection here that the sum is incertain, because by the Judgment its ascertained, and Pasch. 17 Jac. Rot. 452. Necke and Stephen, debt in C. B. on Bail in B. R. as in this case to pay the condemnation, so in Makeland and Kellway, P. 12 Car. 2. Rot. 242. on nul tiel Record, Judgment for the Plaintiff affirmed in Error, and Hill. 1657. Rot. 1144. Lord Peter and Fox, after argument on demurrer adjudged debt lay, and Rot. 1230. Ramsden and Carden, debt on a Bail in Canterbury, on Recognizance, Corpus pro Corpore, and to answer condemnation, which was averred to be to such a sum; and adjudged on demurrer the Court agreed debt lay, but not before a Capias, and the second Sc. Fa. Returned and filed. But by Jones Justice this may be pleaded that they are not filed. But by Wild

Justice

cluded pro ut patet per Recordum, nor shewed where the Sessions of Oyer and Terminer was holden, but only ad Sessionem of Oyer and Terminer, tentam pro Civitate Lond. And by Twisden Justice its ill, not saying before whom nor where the Oyer was. Et Adjornatur.

Benet *and* Mouse.

IN Trespass the Defendant justified as Tenant of Edmunton for Common, from and after primam Tonsuram, after Lammas to Lady-day, and as in 46 Ed. 3. 23. that none may put in Cattle during that time; to which the Plaintiff demurred, because being Lord, and having primam Tonsuram, he cannot be excluded but by a prescription for sole Pasture, and to this the Court inclined. 2. It was to lie fresh after the Tonsure untill Lamas-day, in meliorationem of the Common; and the Cattle were put in after Tonsure and before Lammas, for which Action upon the Case might lie, but the Commoner cannot distrain before his interest begins, which the Court agreed, but Noy 130. and 2 Cr. 208. and 2 Roll. Abr. 267. Adjornatur. (31) Commission.

Jonas *and* Boulton. Ante.

IN debt on Obligation the Defendant pleads that it was in Trust for Host who is a Bankrupt, & Virtute Commissionis, quibusdam Commissioners, &c. this debt was assigned to Ashly and Penning, & aliis Creditoribus, &c. The Plaintiff replies that it was not assigned to A. and P. & aliis Creditoribus; to which the Defendant demurred, specially for doubleness, the Court conceived the Bankrupsie traversable as well as the assignment, but the Issue is well enough. Et Adjornatur. (32) Bankrupt.

Hall *and* Huffam.

IN Assumpsit for 60 l. for Muske delivered, &c. the Defendant pleads in abatement that the Plaintiff and J. S. were joint Merchants, and that J. S. died leaving B. Executor, and that this did not survive as F. N. B. 170. and 1 Inst. 170. to which the Plaintiff demurred, because this amounts but to general Issue, Sed curia contra, that this is a good Plea in abatement. And Judgment for the Defendant, Nisi. (33) Joynder.

Warner

Warner *and* White. Ante. *Mich.* 28 Car. II. *Rot.* 543.

(34) Bail. IN Debt on Obligation, which was on condition that the Defendant his Heirs, Executors, or Administrators pay 70 l. by the 25th of December, or on or before that time render the Body of H. W. a stranger to Prison in London, so as the Plaintiff may declare against him; the Defendant pleads that before the 25 of December, the stranger died, to which the Plaintiff demurred, & per Curiam here is an Election, as in Co. Laughters Case, and one part being become impossible, the Bond is saved. Et adjornatur.

(35) Detinue. IN Detinue of an Obligation, the Defendant after Imparlance pleaded that the Condition was to perform to the Plaintiff and J. S. and prayed Garnishment of J. S. to which the Plaintiff demurred, being but in abatement, and to save Costs; which Detinue 135 cannot be done but by appearance the first day, as tender with uncore prist, &c. Sed non allocatur, for non constat, but he did appear the first day; and it may be the Defendant will not save Costs, and a Respondeas ouster was refused; but process against the Garnishee.

Barton *and* Hamshire.

(36) Ejectment. IN Ejectment of a Messuage, and forty Acres of Pasture, after Verdict Barwell excepted in Arrest of Judgment that an Ejectment lyeth not of Common no more than of a Piscary, 1 Cr. 492. Pl. but by Twisden & Curiam, though Ejectment lyeth not of that alone, yet being after Verdict, it shall be intended appurtenant, and so well enough: And Judgment for the Plaintiff, Nisi.

Hawtry *and* White. *Friday*, Febr. 9.

(37) Obligation. IN debt on Obligation, which in truth was made to A. H. of London Merchant, to the use of A. H. his Factor beyond Sea now Plaintiff; the Defendant pleads that A. J. sealed and delivered an Obligation to A. H. of London Merchant, absque hoc that he sealed to A. H. the Plaintiff; to which the Plaintiff demurred, being but the general issue not Guilty,

Guilty, for if it be not to the use of the Plaintiff, its evidence of not Guilty, which the Court agreed; but held this Special Traverse good with rule, that if Evidence be that it was sealed to the use of the Plaintiff, its all one as if sealed and delivered to him; but this Special Traverse tyeth it too strait to the delivery, and parties agreed so to try it, &c.

Dominus Rex and Humphries. *Monday*, February 12.

(38) Maintenance.

AN Indictment of Maintenance contra formam Statut. Stroud excepted that Ven. Fa. is ad triand' exit' inter, &c. in Act. sur Stat. for Maintenance against the Statute of Imbracers and buying of Titles, and therefore prayed he might only forfeit 10 l. prout by 32 H. 8. Cap. 9. §. 3. which Jeoffries opposed, because as appeared by Copy sworn in Court taken out of the Rolls the title of 32 H. 8. Cap. 9. was, An Act against unlawful Maintenance, Imbracery and buying of Titles, &c. and in §. 3. its to forfeit 40 l. at large, not 10 l. as in the Printed Statute-Book, whereupon Jeoffries prayed Judgment on 33 Edw. 1. pag. 69. or of 40 l. on 32 H. 8. Cap. 9. §. 3. which the Court agreed, and gave Judgment of 40 l. and called the Defendant on his Recognizance, being Bayl'd, &c. Post.

27 H. 8. Cap. 16 of Fees of Inrollment is in Figures. So 32 H. 8. Cap. 1. S. 1. 27 H. 8. Cap. 10 Sect. 11. 5 Eliz Cap. 4. Sect. 25. 2 H. 4. Cap. 23. Sect. 2. 2 H. 4. Cap. 10.

Miles *and* Bateman. Ante.

(39) Bail.

EX motione the Secondary on reference upon due issuing out of Capias reported that it was taken out duely, and four days given by Rule, but that the Writ had not lain four days with the Sheriff, as by the course it must do before any Process can be against the Bail, and therefore per Curiam, Wild absente, the Action was set aside, no Action of Debt lying until Return of Capias against the Principal.

De

DE
Termino Paſchæ

29 *Car.* II. in *B. R.* Anno 1677.

Wedneſday, May 2.

Rainsford Ch. J. & *Wild.*
Twiſden. & *Jones.*

Dominus Rex and Kiffin.

(1) Forgery. LEek pray'd in Information of Forgery that on Rule for Trial (granted Ex motione Mr. Attorny Jones) that it might be added being at Bar, that the Defendant might not challenge for the default of Hundredors; ſed non allocatur; for per Curiam, albeit the Plaintiff may be deprived becauſe he brings it to the Bar, yet not the Defendant, albeit each party do by Rule ſtrike out 12 of 48 Returned, and thereby the Defendant ſtriking out Hundredors might prevent Trial, yet being a priviledg allowed by Law, the Court cannot deprive him of Challenge, and it was denied, &c.

(2) Lieu. NOta that laſt Lent-aſſizes Coram Atkins at Lincoln, Leek's Client was Nonſuited in Action upon the Statute of 1 & 2 Ph. & Mar. Cap. 12. for ſevering Diſtreſs into ſeveral Pounds, whereby the Plaintiff was put to ſeveral Replevins, becauſe the Declaration was ad Parliament. Tent. &c. 11. No. as in the Printed Statutes, but by a Copy ſworn in Court, it appeared to be Tent. &c. 12 No. and ſo is Co. Entr. 43. b 44.

Symbal

Symbal *and* Norfolke. *Thursday*, May 3.

(3) Parliament.

After Execution the Defendant shewed a Writ of Error, ad Sessionem proximi Parliamenti Tent. 13. Febr. for 15. Febr. which per Curiam is void, and being actually taken out after no restitution.

Thomas *and* Smith.

(4) Ayde.

Symson on 2 Inst. 269. pray'd to set aside Aid-prayer on plea that King James was seised, and granted to Fouke, &c. under whom the Defendant claimed reserving a Rent, because the Ejectment being of the Mannor out of which no Rent issueth, nor no averment, that at the time of the Ejectment this Rent was in the Crown, wherefore being sold upon 22 & 23 Car. 2. Cap. 24. and no Patent produced, which is of Tenement called Dryhill, and no part of the Mannor of Dryhill in question, and this would put off all Trials in Ejectment. Maynard Kings Serjeant, for the Defendant, Albeit the Defendant would wave the Ayd-prayer, yet 9 H. 4. 4. Rege Inconsulto lieth where the Kings Interest is concerned, and the Defendant need not aver in whom the Rent is, because the King may dispose that where he will; but he agreed that if the Rent be sold no Ayd-prayer lieth, but this must come in by the Plaintiffs Replication, that it is granted away, and it need not be averred, which the Court agreed; & nient comprise is a good Issue, and therefore must come in by Counterplea, the Defendants plea being that the King was seised of the Lands in the Declaration, but this being a Sale by Act of Parliament, the Court must take notice its granted away not being excepted; also though the plea be hic in Curia prolat. yet that is not sufficient without actual shewing the Patent to the Court, and being a plea put in for delay after Judgment prayed against Casual Ejector last Term on Prayer thereof, and to be made Defendant, per Curiam, the Defendant was ordered to plead in chief, for the Patent should be shewed when the plea for Aid was pleaded, without demanding, as on Praying Priviledg, or Cognizance, which ousts the Court of Jurisdiction, and this is Examinable whither shewed or not by Witnels in Court. Post.

Spring *and* Eve. Anre.

(5) Sheriffs. 1 Anderf. 294. Raft. Abridgment, Elench. Parliament. 28 Eliz. 29 Octo. fecunda Seffio Parl. Tent,&c. usq; Diffolut. Inde 23 Marc. fequent.

IT was moved in C. B. in Arreſt of Judgment in Act. ſur Stat. 29 Eliz. Cap. 4. againſt the Sheriff for exceſſive Fees, becauſe its ſaid ad Parliament. Tent. by Prorog. 15 Febr. 29 Eliz. and the Rolls as appeared by Copy ſworn 29 Oct. 28 Eliz. the Parliament began, and an Adjournment thorough 17 No. 6. and no Prorogation at all, Simile ſo 35 Eliz. 1. §. 11. its ſaid 29 Eliz. 6. &c.

Nevills *Caſe.* Ante.

(6) Demiſe.

IN Ejectment the Plaintiff in Trial at Bar claimed as Heir, the Defendant by Will of his Anceſtor claimed, which being part Capite Lands was void for two parts, and it was urged, void for all being deviſed to the Wife in lieu of Jointure and Thirds, which being at the Election of the Wife, ſhe having brought ſeveral Writs of Dower hath determined her Election, but no Return appearing on record its no Election, but it was conceived it would if Returned without Declaration.

(7) Church.

POlyxphen plaied Prohibition to the Biſhops Court of Wincheſter on Tax ſet on part of the Pariſh of Kingſclere by Web the Parſon and the Churchwardens on 2 Roll. 291. & per Curiam, though the reaſonableneſs of the Tax be a queſtion proper for the Spiritual Court, yet this being a good plea there is cauſe of Prohibition and a Prohibition, Niſi.

Norden *and* Levet, Executors of Norden. Ante. 150 Pl. 18.

(8) Executors.

ON Scire Facias Special Verdict find the Inteſtate entered Recognizance to the Plaintiff, and the Executor Renounced, and then the Adminiſtration was committed to the Defendant Levet, before which Hope was a treſpaſſer by converſion of the Inteſtates Goods, after which it was agreed Hope ſhould pay 600 l. to the Plaintiff, and the money not paid Hope was taken in Execution, and if this alters the property they find waſt; and Ayers for the Plaintiff

tiff, That this compoſition, Yelverton on W. Gorings Caſe, is waſt, becauſe elſe the Defendant might be twice charged to the Executors of Levet, and to the Plaintiff, and its the Defendants folly to make ſuch deed of Covenant pending the Suit againſt him, but no Execution. Polyxphen for the Defendant, The Trover againſt Hope is not diſcharged by this Covenant as debt or contract certain might be, nor is this pleadable otherwiſe than by accord, nor ſo without Deed, and by Deed not without ſatisfaction, as Co. Petoes Caſe, and Hob. 68. one Bond given in ſatisfaction of another payable before it, unleſs paid. 2. Devaſtavit or not, is matter of equity, as Roll. 920. Harwood and Wraymans Caſe, and 18 H.6. 64. Executors ſhall not be charged farther than the money received, and Goods in Executors hands, or term ſwept by Execution is excuſe for the Executor, 2 Anderſ. 157. And had a Judgment againſt Hope been accepted, yet till paid, it would not charge the Executor; all the Caſualties on the Eſtate as they are benefits to the Executor, ſo unleſs they accrew they ſhall not charge the Executor: Twiſden doubted the manner that the Venire Facias is out of the Chancery, returned in Chancery, the Iſſue being removed, but per Curiam this is well enough; but the Niſi Prius is in B. R. and the Diſtringas upon bringing in the record of Chancery after Return of the Venire Facias; and the matter is not whither this be a Devaſtavit as to other Creditors, but only as to the Plaintiff, whoſe debt is but 540 l. and its not found Hope came by the Goods by wrong, and he might have waſted the Goods before this agreement, but upon the Sale by the Executor to Hope he ſhall be charged with aſſets for what its ſold, but this agreement will not charge him with waſt, contra per Wild Juſtice, that this Covenant being to pay 600 l. for the Goods, the property is altered, and its all one with a Sale, as charging Security, though no money be received; which Jones Juſtice and Rainsford Chief Juſtice agreed; and it was at the Executors Election, and he was not bound to make any agreement without actual payment; & per Curiam the concluſion of the Verdict ſhould be if aſſets or not, and not if waſt or not, which without colluſion will not be intended in Executors, but Iſſue was non elongavit vendidit ſeu convertit, ſo Verdict on either is ſufficient to charge the Defendant: and Judgment for the Plaintiff, Niſi. Poſt.

(9) Parliament. NOta, it was said that there is no Prorogation to 18 Febr. 14 Car. 2. as Printed in the Collection of the Statutes, Edit. 1667, but its only 13 Car. 2.

Cock *and* Heathcock. *Monday*, May 7.

(10) Slander. AFter Verdict in Action upon the Case for slander of title, Levins excepted in Arrest of Judgment, that the words were, I have a surrender of the Lands of B. and intend to sue for the same, and that the Plaintiff hath no title, on 4 Co. Gerrards Case, because the Defendant claims title himself, the consequent whereof is that the Plaintiff hath no title: and Judgment for the Defendant, Nisi.

Ednian *and* Smith. *Tuesday*, May 8.

(11) Admiral. SAunders excepted to Prohibition to Admiralty on Sale at Land of Goods taken by Piracy, because the original being of their cognizance, the consequents shall, as 3 Cr. 685. Yelverton 134. be tried there; so being no Sale in Market overt, which only alters the property, and though it be not said to be super altum mare, yet the Ship could not otherwise be carried to Tunis; Mr. Attorny Jones contra, That it must be alledged to be as well as to be done super altum mare, and its not alledged the Ship was taken super altum mare, which the Court agreed, and denied leave to go to the Admiralty to mend, & per Curiam a Prohibition Award being the case of taking by enemies re vera (by Tunis men of War) in which case the Sale alters the property, and is triable at Law; contra of Piracy, and parties agreed to stay until Trial at Law, whither taken by enemies or by Pirates.

Gregory *and* Mayo.

(12) Assumpsit. IN consideration the Plaintiff promised to pay so much per Annum for five years, the Defendant promised to save the Plaintiff harmless against all persons occupying, &c. except the Parson of the Parish: The Plaintiff avers that one More entered upon him, and after Verdict, Tremayn, on Wotton and Heals Case, excepted that its not shewed Mayo had any title, so 2 Cr. 444. Polyxphen for the Plaintiff, that this being no Lease it shall not be so intended, and all the former Cases are in Covenant, or on actual Leases, but here is but a bare agree-

agreement to enter and ſave harmleſs, which hath no relation to any title of Land but only to the poſſeſſion, which Wild Juſtice agreed, and ſo is Dyer pl. contra in Hob. Tiſdal and Eſſex, which the Court agreed, and Judgment for the Plaintiff, Niſi.

Noble *and* Harris.

IN debt on Obligation, on condition to perform an Award; On no Award pleaded the Plaintiff ſet it forth and aſſigned breach; the Defendant rejoyned that before the Award made the Plaintiff revoked; The Defendant ſurrejoyned that it was true he did revoke, and that afterwards the Plaintiff conſented thereto, to which the Plaintiff demurred; & per Curiam the Revocation being a breach, its not aided by conſent or agreement after, but if it had been ſaid to be revoked by conſent of the Plaintiff, the penalty had been ſaved, and Judgment for the Plaintiff, Niſi. (13) Arbitrement.

Hatton *and* Read. Ante.

WIld Juſtice and the Court conceived this a Fee, becauſe by poſſibility more might be paid, then the Deviſee could raiſe by that time out of the Rent, as if the Teſtator died two months, a month or leſs before the Quarter-day; & per Curiam Judgment affirmed, Niſi; Twiſden abſente. (14) Deviſe.

Breers *and* Boulton, *Wedneſday*, May 9. Ante.

IN Replevin the Defendant avowed on power to grant Annuity to Daughter married or unmarried, agreed to be paid for Marriage Portion; that Roger who had the power gave to the Defendants Wife 100 l. and after granted the Annuity by the power; Mary Breers married Boulton the Avowant, Special Verdict find agreement by Grandmother to give 150 l. in abſence of Mary, and without mention of Marriage, and if this were a Marriage-agreement within the power, for the Defendant: Holt for the Plaintiff, Here being no diſcourſe of Marriage previous it can be no Marriage-Portion. 2. Alſo the power is to grant for raiſing a Portion of 200 l. ſo until 150 l. raiſed is not good, no more than Eſtate for two lives on power to Leaſe for three lives: Alſo 3. this (15) Powers.

Grant

Grant after Marriage would not be sufficient Execution of the Power without agreement precedent: Levins contra, the Grant is in the words of the Power, and in Bridgmans time in Chancery a Lease for ten year was held good on power to Lease for twenty one years, 1 Anders. Pl. 282. & 1 Inst. 52. & 2 Co. 8. Whistlers Case; also the Issue here is on the agreement, and its found Roger agreed to give 150 l. for a provision, and that this Deed was in pursuance thereof, and its found the Marriage-Portion was unpaid at the Testators death, which the Court agreed, and Judgment for the Defendant; and so by Jones and Twisden on the Statute of Leases otherwise than for three lives, or 21 years, a Lease for less is good.

Arnold *and* Sibly.

(16) Executors.

IN debt as Executor, the Defendant after Imparlance pleads that Actio non, because he is Administrator, absque hoc that he is Executor, to which the Plaintiff demurred being no plea in Bar, but only in abatement on Lane and Brotherton, which the Court agreed, and notwithstanding 7 H. 6. 11. & Co. Robinsons Case: Judgment for the Plaintiff.

Trig *and* Turner. *Thursday*, May 6.

(17) Common.

AFter Verdict on Prescription for Common for great Cattle all times of the year in Alice Forest by the Tenants of Farnham. Stroud Serjeant excepted, That this is the Kings Forest, and there is one month, viz. fifteen days before St. Swithin, and fifteen days after; which as Manwood 281. being a Fence-month, no Cattel can be put in; the Plaintiff agreed that small Cattel, Hogs, Sheep, &c. cannot then be put in them; contra of great Cattel that do not injure the Common: also by Wild Justice this Replevin is of taking in February, which being no Fence-month, the Prescription is good enough as to this, but this being as Issue on modus intire by traverse of the Prescription it must be made good for all. Et Adjornatur.

Thomas *and* Smith.

(18) Ayd.

ON sight of the Patent whereby the Rents were granted out of the King upon Ayd le Roy, Br. 72, 84. & Ass. by Examination it appearing the King cannot have prejudice,

prejudice which is ſufficient on 2 Inſt. and Judgment againſt caſual Ejector, Niſi.

Hony *and* Daniel.

IN debt againſt Bar. & Fem. for 27 l. debt on Devaſtavit, the Defendant pleaded former Judgment of 31 l. in Bar, which was arreſted for being of 4 l. coſts againſt the Baron. & Fem. to which the Plaintiff demurred, and the Court inclined it was ill. But Adjornatur. (19) Baron & Feme.

Dominus Rex and Linter.

GOuld excepted to Indictment of reputed Grandfather of a Baſtard, becauſe by 18 Eliz. Cap. 3. only the reputed Father is chargeable, which the Court agreed, and the Indictment and Orders removed therewith were quaſht. (20) Baſtard.

Robinſon *and* Woolly. *Hill.* 25 & 26 *Car.* II. *Rot.* 412.

TRindet conceived that Induction by 1 Ed. 6. 2. §. 6. N. 4. by Warrant of the Archbiſhop is good F.N.B. 47, & 28. and not repealed by Conſecration of the Biſhop of the Dioceſs before Induction, 24 Ed. 3. 30. Co. pl. 21. and only Action upon the Caſe lyeth, as in 1 Roll. 125. & 195. againſt the Archdeacon, 2 Roll. 294. 356. Abridg. for the Mandat is not revocable in it ſelf by the Archbiſhop or the King. 2. Had the Biſhop of Glouceſter been conſecrated before the Mandat, yet 2 Hen. 4. 17. Pl. 25. the Archbiſhop before the Statute of 23 Hen. 8. Cap. 9. had a Juriſdiction, which as to Inductions is not thereby Hob. 15. taken away, Moor 879. Pl. Middleton and Lodg, a Prohibition was therefore denied, and prayed Judgment for the Plaintiff on Special Verdict in Ejectment. Ward for the Defendant, Its found J. S. was ſeiſed, and preſented the Leſſor of the Plaintiff to the preſent Biſhop, and that the ſame day a Warrant was directed to the Archdeacon to induct, and that the Plaintiff was nullo alio modo inducted, and he excepted on 13 Eliz. Cap. 10. §. that the Verdict is only that the Archbiſhop had Teſtimonial, but find no reading of the Articles; ſed non allocatur, for there is a month after Induction to read, and its not found he did not read. 2. The Biſhop (21) Encumbent.

38 H.6. 15. can only give power to induct, and the Archbishops power, out of which his Mandat is derived, is ceast by Consecration, and the Archbishops power is only by way of appeal from the Bishop, not concurrent originally, 11 H. 4. 9. which Wild agreed, and that this is as a Letter of Attorny which is determined by death, and the Archbishop hath no concurrent power, but the Mandat must be by the Bishop, which the Court agreed, and death of the Archbishop had determined it. But Adjornatur. 319 Pl. 14.

Taylor *and* Baker. *Hill.* 28 & 29 Car. II. *Rot.* 436.

(22) Sheriffs.

IN debt the Defendant pleads that he was a year in execution, and the Plaintiff could not be found, whereupon he paid the money to the Goaler: The Plaintiff replieth that he was to be found at D. absque hoc that he absented eo animo, to keep the Defendant in prison, to which the Defendant demurred, because the Marshall may die, and no recovery can be by the Defendant against the Marshall, if he doth not pay it over; but per Curiam Judgment for the Plaintiff, it being not reasonable to pay money to the Goaler for the Plaintiff, whither he will or not, also it is too hard for the Plaintiff to prove payment, or to prove assets in the Executors of the Marshall. Sed adjornatur.

Thatcher *and* Moys. Ante.

(23) Slander.

IN Slander for saying the Plaintiff kept a Bawdy-house, cumq; etiam at another time, ex ulteriori malitia said the same words ad Damnum. Tremayn on Stiles 430. 117. 130. 3 Cr. 507. & 2 Bulstr. 214. & 2 Cr. 537. excepted that as in Assault the cumq; etiam is but recital, and no averment, as where something follows it is, as quod cum A. was in pace Domini Regis. Squib contra, as in action of debt, and Assumpsit quod cum the Defendant was indebted, and in action upon the Case for keeping a dog ad mordendum oves consuet. & cum, signifies sometimes that as in Tyrrens, Act. 1. Scen. 1. preterquam, & Pl. Com. 128. Bucklyes Case, & Rast. 2. in Act. sur Cas. against a Carrier, it is quod cum and traversable; & per Curiam Judgment for the Plaintiff Nisi; but Jones doubted it was but recital and no positive averment, Twisden absent.

Pagit

Pagit *and* Vossius. Ante. *Saturday*, May 12.
34 Pl. 40.

SPecial Verdict in Ejectment on Lease of Mrs. Henningham, find that this was Dr. Browns Land, who devised it to my dear Friend Dr. Vossius during his Exile from his own Country, and if it please God to restore him to his own Country, or if he die before, then to Mrs. Henningham for ever. Dr. Vossius is an alien born in Holland, and on displeasure of the States taking away his Pension of Historiographer, after which War was proclaimed between us and Holland, after which this Devise was made, &c. Serjeant Pemberton for the Plaintiff waved the Defendants being an alien being able to take, though not to hold against the King, and insisted on the intent of the Devisor, which was not any absolute Estate for life, but limited until his restoration; and with us the most common import of the word Exile is a penal prohibition of Return after Transportation, and the Defendant was never under such penalty, therefore this cannot be the meaning, for then no Estate would pass to the Devisee no more than to a married Woman durante viduitate, or to Fem. dum sola, that marrieth before the Devisors death. 2. Exile is sometimes taken for absence, though improperly and figuratively per Catecrisin, this cannot be the sense or intent of the Will, unless strong proof inforced it; and if it please God to restore, cannot be applied to voluntary absense. 3. Exile is taken for being under any displeasure of the Government, whereby he withdraws for a time, which partakes of both, the other being a voluntary choise of the less inconvenience, as in wast, Exilium in hominibus, Register & 52 H. 3. Cap. which is the most proper sense here, and implieth the hardship used to Tenants, 2 H. 6. 11. the Countess of Arundels Case, and its found the Defendant was under displeasure with the Government of Holland, which the Devisor was privy unto, and by the Peace his return is open, and he may be restored; and albeit it be found he did not return, yet because he might return its all one, as 15 H. 7. 1. Annuity until promotion, if a promotion be offered the Annuity is gone if he refuseth: Holt for the Defendant, That the Defendants coming for displeasure with the Government is an Exile, so Calvins Lexicon. verbo Exilium, which is by most Authors divided into voluntary and involuntary, as Marius on displeasure with Metellus went to Rhodes in Exile and inability to stay is equivalent to Prohibition

(24) Devise.

from staying, 1 Inst. 53. b. taking away the maintenance of Villains is Exilium, and the same cause still continueth, and its not found the Dr. was reconciled to the States, nor his Pension recontinued; but that its given away to another, and the devisor knew the same State that now is. 2. The Defendant came hither before the War, and was never under any restraint by the War, and if he were, the place concerns not Rebels, but only the publick Enemies; and therefore the Estate is absolute, being on condition subsequent and impossible: Twisden, The intent was only that the Estate should be during the continuance of the impoverishment, which was but during the War or while he was provided for: And by Jones, If it please God to restore, cannot be intended to continue until the Defendant will return, but until Gods providence removes the Obstacle of his return, which Wild agreed; contra by Ransford Chief Justice, that the same cause of Exile yet remains, and this was a provision until he was restored to his Pension. Et adjornatur.

Reading *and* Bradborn.

(25) Execution.

Sarjeant Pemberton prayed restitution in Scire facias on Judgment, to shew cause why the Plaintiff should not have residue of Execution; the Defendant pleaded he had no Execution, nor was possest, and Issue on the possession, and not on both, as the Writ is, so that now its but a suggestion of more Goods; and the Jury find possession of 300 l. and as to the residue of the 665 l. find nothing, which is imperfect, 1 Inst. 257. which was only the notes of the Verdict, but the Postea was for the Defendant pro residuo; and in C. B. Trespass of throwing away Tubs, the Defendant justified to set up a Stall, which the Plaintiff pulled down, and Issue thereon set aside as immaterial; & per Curiam, there could be no legal possession without Execution, so the Traverse is immaterial; but the Plaintiff might have demurred, and a new Tryal on bringing in Money.

Huntbatch *and* Lee. *Monday*, May 14.

(26) Devise.

Fowler the Lessor of the Plaintiff claimed as devisee of occupation of residue of a Term for 1000 Years devised to the Defendant, if W. L. dye without Issue, and against 2 Cr. Child and Bailies Case, Williams on 8 Co. Mannings Case, that this is an executory devise, and not a possibility upon a possibility, as in 2 Cr. Also that

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is to deviſee and his Aſſignees, this only to the deviſee, which on Bulſtr. Retorick and Chapells Caſe is good enough, and in Saunders and Corniſhes Caſe, 5 Car. 1. there is no difference between deviſe of Term and of occupation, and this is but a limitation upon Contingency no intereſt in J. S. 2. The leſſor of the Plaintiff and W. L. the firſt deviſee are Executors who aſſented, but per Curiam this will not alter the operation of Law. 3. Its ſaid the Defendant entred jure ſuo proprio, whereas he was but Executor of deviſee of the term and no Will proved; ſed non allocatur. Burton for the Defendant, Amner and Lodington was the firſt ſtarting of this deviſe, and not ſetled untill Mannings Caſe, 8. Co. and there agreed void as a Remainder; and 10 Co. Lampets Caſe agrees this an intereſt not aſſignable, but to avoid a perpetuity they held it might be releaſt, and there is no remoter Contingent then of a life allowable in any ſuch deviſes, as Lewkners Caſe, and Leventhorp and Aſhbyes Caſe, for hereby any perſon might create a perpetuity, and eſpecially for the remote poſſibility its void on 2 Cr. Child and Baily, for the deviſee may outlive the term, and if not, yet its another remote poſſibility, if the deviſee die without Iſſue, and ſo held in Burghes and Burghes term to A. for life, and then to the firſt Son in Tail, held void in Chancery, ſo Salter and Butler on deviſe of Chaworth to Feme for life, to renew the Leaſes of the Biſhop of Salisbury, and on death to two daughters in Tail, and on default of Iſſue to the heirs at Law adjudged void to the Heirs, and good to the daughters. Wild Juſtice on Goodyer and Clerks Caſe, that had the deviſee had Iſſue, which died without Iſſue, the Contingent ſhould never riſe. Jones Juſtice, there is no difference between this and Child and Bailies Caſe, for Aſſignees make nothing in the Caſe, but is all one as to him and Executors; therefore in Jones Aſſigns are omitted, which Rainsford Chief Juſtice agreed. And Judgment for the Defendant, Niſi.

Buller *and* Waterhous. *Tueſday*, May 14.

IN Trover by conſent tried at Bar by a Hardfordſhire Jury, of Wood cut on the Rectory of Badborne in Yorkſhire, the Plaintiffs title was under the ſettlment of Sir John Maynard and his Wife, by Fine of her Lands on marriage of the Son, on conſideration of 5000 l. Portion paid Octob. 1652. to the Father on Truſtees for 80 years for paiment of Portions and ſecurities of the Truſts in another Indenture of the ſame date, and delivery of the Wives Joynture, and (27) Trover.

on paiment thereof to be surrendred, which was paied, and the Freehold was to the Wife for life, then to Sir John for life, then to the Son in Fee, with power in the last deed to revoke by consent of Trustees; And if this were fraud against the Defendant who purchased from the Wife of Sir John Maynard, 13th of July 27 Car. 2. by Lease and Release was the question by the Plaintiff, who married the daughter and Heir of John the Son: The Plaintiffs conceived this being a Power reserved not to the Son alone, nor as Standish and Bullens Case, this is no shift to put the power in others names, but this revocation must be by all parties, or the survivor on valuable consideration: which by Lord Chief Justice Bramston upon 27 Eliz. Cap. 4. §. 5. was held good, and not within the Statute as a voluntary settlement; The Defendants justified this, as to the Wives Lands the power was but on consideration, during the term, not after, because the Wives Estate was excepted out of the first power in the term, and so as to her Inheritance after that term it is but a voluntary Conveiance; but per Curiam, the consideration cannot be divided: And though the deed were as well for Marriage and Affection as for money in Portion, yet this is a deed for value in the Son as well as in the Wife, whose Portion it was.

----------*Wednesday*, May 15.

(28) Executors.

NOta, It was said in debt against Executors on Wast, in debet & detinet, to say there are such Judgments, and that the Defendant hath no Assets ultra, to satisfie, &c. is no plea, but he must answer to the Wast, or plead nil debet; and else it were fit to demur: Contra by Saunders, for to plead so, is to leave it in the breast of the Jury to try the matter of Law what is Wast, therefore its sufficient for the Executor to shew the Judgments, and that he hath but 12 d. ultra to satisfie the said Judgments, Quære.

(29) Treason.

NOta, It was said if A. Tenant in Tail be attaint of Treason, and the King grants to D. against whom a Writ of Entry is brought, and D. voucheth A. and so a Recovery is had, that this shall bar the Remainder to B. &c. because as Vouchee he comes in of all Estates and Rights as Privy. Contra by some, here being not scintilla Juris of the old Entail left in A. the Vouchee of A. cannot bar that Estate

Estate which was not in him, as on a discontinuance it might. Quære if the King had regranted to A. and then a Recovery had been against A.

Earl of Salisbury, *and* Joyn, Selby, *&c.*
Friday, May 18.

(30) Coron.

ACtion upon the Case by the Plaintiff seised of the Manor of Redrith, and having privilege of Deodand for taking away the Body of one Holloway, on whom Ship fell and killed him, and within six hours removing it out of the County, whereby there could no Record thereof be taken by the Coroner, without which the Plaintiff can make no title. And by Dalby Recorder of L. he hath been several times thereof Nonsuited for want thereof. On Not-Guilty tried at Bar, it appeared Holloway was killed 60 foot from the low-water mark, and within 30 foot of the Dock, which being below Bridge, and between the high and low-water mark thereof, 15 R. 2. Cap. the Jurisdiction is in the Admiralty. 2. The Land between high and low water mark is the Kings, so the Plaintiff without grant of the Soyl cannot claim privilege within his Manor. Maynard for the Plaintiff on Earl of Arundel's Case, and the Town of Plymouth, on the like occasion of Deodands in the River of Pool, wherein it was agreed per Curiam in Exchequer in time of Hales Chief Baron, though de Communi Jure, such Lands are the Kings, yet they may be parcel of the Manor, and so found in Special Verdict on Mr. Prodgers Patent of the Soil in question: But per Curiam, whether the Soil be the Kings or not, the Admiralty hath nothing to do with it, which Mr. Attorny Jones for the Defendant admitted; but because the Plaintiff could not prove the Land between high and low-water mark to be the Plaintiffs or parcel of the Manor, the Court directed for the Defendant, whereupon the Plaintiff was about to be Nonsuited. Twisden Justice said that the Plaintiff hath not lost his Action by taking away the Body, for notwithstanding that the Justices may enquire, which was agreed in case of Felo de se, which is Felony enquirable, contrary here on 5 Co. 110. b. Foxlyes Case; but Verdict for the Defendant.

Stroud

Stroud *and* Dickinson *in Chancery.*

(31) Mortgage.

NOta, That the Defendant having Obligation from J. S. to secure his debt purchased in one Judgment precedent to his own debt, and another subsequent, yet in time before the Judgment had by the Plaintiff from the same J. S. thereby hoping to have his own debt that was mesne satisfied, but the Plaintiff having extended, and being evict by Tryal on the first Judgment, prayed the Defendant might account and take payment thereof that so he might be let in, which Finch Chancellor decreed, albeit the second Judgment was precedent to the Plaintiff, being never extended, but purchased for small value to save the debt by Obligation, which was said to be contrary to the accustomed practice of the Court.

Plummer *and* Whitchcot. Ante. *Saturday,* May 19.

(32) Escape.

THe Declaration is that at time of Lease and Commitment of Prisoner, and at the time of the Action the lessee was insufficient, and Verdict is only that he was insufficient at the time of the Lease and of the Escape and Commitment, but say not that he was insufficient at the time of the Action; which is the Gist of the Action, and if he were sufficient at the time of the Action, none lieth, by Wild Justice, which the rest doubted. But per Curiam the Defendant is a superior, and chargeable for the debt of the Plaintiff, and as to the other Adjornatur.

Marchant *and* Whitpain.

(33) Church.

IN Action upon the Case for disturbance in Seat in the Church of Hurst-purpoynt, The Plaintiff counted on seisin in Fee of a House, not said (Ancient) and that he and all those whose Estates he hath (not said time out of mind have) used, and had a Seat therein for himself and Family to hear Divine Service, and have used toties quoties to repair it. Saunders after Verdict excepted in arrest of Judgment, that no title of prescription is alledged. Symson for the Plaintiff, That against tort fesor its sufficient as alledged: But in Prohibition or Action upon the Case for a Seat, prescription must be alledged

ledged, which the Court agreed; And Judgment for the Plaintiff, being only for damages for the disturbance.

Gregory *and* Mayo. Ante.

IN consideration of promise of 7 l. per Annum for five year, the Defendant promised to save harmeless against all but Person: The Plaintiff shewed that one Mare entred. Polyxphen praied Judgment after Verdict, here being no Lease as there was in the Cases of Brocham and Cham, and Lee and Gotier and Mountfords Case, Dyer 328. Hob. 35. but its a meer agreement, and so no lawful title of Entry need be shewed; which Wild Justice and Jones agreed, the debate not being concerning the title, but only de and concerning the Occupation; and in Covenant that the Defendant was lawfully seised, which was intended as to the title, and a Covenant for quiet enjoyment, which was intended only as to the possession. (34) Condition.

Jepson *and* Jackson.

ERror of Judgment in C. B. After Verdict, in Trespass the Defendant justified by licence to the Defendant for himself and his Wife to Inhabit; the Defendant replieth non licentiavit, the Husband and Wife modo & forma, and its found non dedit licentiam modo & forma. Levins excepted that this is a variance; the License to the Husband not surviving to the Wife as License to Baron & Feme doth, which the Court agred. Sed adjornatur. (35) Baron & Fem.

Bastard *and* Stewkly. Ante.

MAsters against the Prohibition on demurrer, That this being a Testamentary thing, its of Ecclesiastical Cognizance; and 2 Roll. 301. they shall expound this legacy according to their Law, Attachement sur Prohib. Br. 4. and Yelverton 172. and 2 Cr. and 1 Roll. 426. Mothams Case, and 2 Bulster. 227. Barker, and as to the assent to the Legacy. 2. This takes not away the Jurisdiction; for though of thing certain Action might be at Common-Law, yet as Devise Br. 6. not for incertainty, as here for two parts of four parts of eight parts. 3. As 3 Cr. 511. Wrights Case, the allegation of a Plea is nothing, the substance of it being immaterial; but on Pleas in Bar, as Simony, &c. its otherwise, Co. Entr. 456. Green (36) Legacy.

456. Green and Burch Co. Archbishop of Canterburies Case, and so Sydown and Holmes, and Co. Jeofferies Case, refusal of Immaterial Plea is no cause of Prohibition. Polyxphen for the Defendant 2 Rol. 301. comes not to this case, that was because the Court here could give no remedy for a sum of money devised, but this is devise of rest and residue to Alice and Bevill Executors, who by assent are Tenants in Common, and have remedy against each other at Common-Law as other Tenants in Common; wherefore the Legacy is hereby ended, and after an assent there is no remedy in the Spiritual Court for Goods, but only for Money; wherefore on death of one the other cannot sue for that moety by surviver; and by the demurrer on the Prohibition its confest the Plea is a good Bar by our Law, therefore on Moor 915. pl. 2 Cr. 206. Bennet, and 2 Cr. 45. Morris and Eaton; he praied a Consultation, & per Curiam, by the assent its altered from a Legacy, and one could grant only her own moety; but they are only Joynt-tenants in interest still; yet whether they are so or not is tryable here, and not in Spiritual Court; Contra by Jones, there being no remedy but in Spiritual Court for incertain part; but by Rainsford Chief Justice and Wild Trover lieth on actual conversion of the Goods by one. Et adjornatur.

Lord Suffolk *and* Burket.

(37) Sheriffs. IN debt on Obligation, condition that one Harwell should appear: The Defendant on Oyer pleads the Statute of 23 H. 6. Cap. 10. and the Plaintiff was Baily of the Liberty of St. Edmunds Bury, and took the said H. without Warrant directed to him, and kept him until the Defendant gave Bond; to which the Plaintiff demurred, because, albeit the Bond of H. might be void by Dures, yet the Defendant was at large: Sed non allocatur, for though it were as it is, without Warrant or Writ, yet the Bond is void by the Statute or at Common-Law, and the Defendant cannot prove the Bailies Warrant. Et adjornatur.

Kent *and* De'aubeny. *Tuesday*, May 22.

(38) Assumpsit. INdebitat. of 49 l. for 106 Sheep before on the Defendants request, sold and delivered to the Defendants Father. After Verdict Polyxphen excepted in arrest of Judgment that the Father is here a stranger. Gold contra, on Cokeram and Dalkith, Pasch. 27 Car. 2. ruled that the Court will intend such

such a consideration as may maintain the promise; and had Vendidit been omitted, it had been sufficent for Goods delivered on request. And by Wild Justice F. N. B. is, cure J. S. and I will pay you, and Cockrams Case was Indebitat. against the Brother on Assumpsit to pay Marriage Portion, if the Plaintiff marry the Sister, and after Verdict if the Defendant can any wayes be Indebted Indebitat. lyeth, which the Court agreed. And Judgment for the Plaintiff, Nisi.

Corporation of Ironmogers *and* Naylor. Ante. *Pasch.* 28 Car. II. *Rot.* 543.

SYmson for the Plaintiff, in Trespass the single question, is If new built Houses shall pay Hearth money: and that they shall not is clear by the Statute of 14 Car. 2. Cap. 10. that calls it a gift, which as a Subsidy must arise out of some Profit that may spare it, and not to be as a Penalty upon them; and for this reason the King Car. 2. Cap. §. was pleased to pardon the City of London; and this is the reason of all Customs that Ebbe and Flow: Also in the Statute where Inheritance is concerned the word Owner is used, who is charged thereby to account of the charge. 2. The Statute appoints the demands and distresses shall be at the House where the refusal is only presumable to be; and where Acts of Parliament create duties they must be proved; and the King cannot distrain out of the Ward as for another duty he might: Also Car. 2. Cap. §. was to prevent frauds in Collectors Notes; and therefore before the Subject can be charged it must precedently be known upon Record that they are chargeable; and therefore those penalties are Annext. Mr. Attorny Jones for the Defendant, That the distress is well taken. 1. That empty Houses while empty shall be chargeable, and nothing but a new Act of Parliament can exempt them Car. 2. Cap. chargeth every dwelling and other House, which must be intended Houses uninhabited; Domus mansionalis is not where any any man hath or may inhabit, but where any doth inhabit, and so its taken Coron Br. 179. and Car. 2. Cap. §. 2. speaking of Owners and Occupiers, answers that difference: Also Car. 2. Cap. §. Occupiers shall give account of Chimnies and others, there shall be Bills of notice first on them while empty, which were useless, unless the Owner were chargeable: Also want of Inhabitants had been as necessary to be Returned as the Certificates of Increase and Decrease of Chimnies, so Car. 2. (39) Taxes.

Cap. §. he that divides a great House, if he paid before, he shall do so since; and its not necessary the Owner should dwell in his House before he pay: Also every man hath more Chimnies than he useth, yet as long as they remain they shall pay, and cannot be stopt; and profit is not here the measure of the duty, but as Pole-money, or to pay for every Door or Window, this is but a way of Computation, not for the profit or pleasure. Also there is as much reason to exempt Houses that stand empty, as that were never inhabited, and the Statute makes no distinction. 2. The Return might be made yearly, but needs not, here being only to inform the King of the number of the Chimnies and the Revenue, and no process Issueth hereon out of the Exchequer, nor is the Subject charged: Also though the Officer Return more Chimnies, the partie is not Estopt, but may have his Action: also this Return is but yearly, and therefore distress shall not be staied so long; This is like Officers not swearing, Information is only penalty to him, as 1 Cr. 316. upon 21 Jac. Cap. 4. Moor. 447. pl. upon 25 H. 8. Cap. 21. §. 9. not Inrollment of dispensation makes it not void, but is penalty on the Officer. 3. The demand being at one House and distress at another is no argument that only dwelling House is chargeable, as a Rent out of Land and House must be demanded at the most notorious place. 4. The Statute doth not confine the distress to the House; therefore according to the reason of the Common-Law the King may distrain the Owners Goods any where, and to this the Court inclined. Sed adjornatur.

Plummer *and* Whitchcot. Ante.

(40) Escape.

VErdict finding the party disabled once, the Court will not intend ability, Moor pl. Doleman and Vavasor, finding the Indenture supplies the intent against vehement Presumption, as here being but a small space distant, Hob. 262. in Fullwoods Case, 4 Co. the Court on Special Verdict find all necessary Circumstances, and without this the Action lieth not; 1 Cr. Leycroft and Dunker, once broke shall never be intended whole again; also there was no other reason to find the Special Verdict but the disability; but per Curiam, this cannot be intended without finding, no more than fraud; and if the Goaler were able at any time, the Superior shall not answer. And by Twisden in Trespass not found continuando ad Damnum held ill, so on Lord Tracyes Case, averment that the Defendant did not secure the Plaintiff

Jackson *and* Jepson. Ante.

ERror of Judgment in Trespass, that the Issue is not well joined, the Bar being by License to the Husband for him and his Wife and Family to dwell there: Replication is that the Plaintiff gave no License to Baron and Feme, and after Verdict for the Plaintiff this being no Lease at Will, its aided by the modo & forma, as 1 Cr. 6. paiment pleaded by the Defendant, and Replication that neither the Defendant nor A. nor B. paid modo & forma, which was aided by Verdict, and here the putting in the Wife is but Surplusage, as quod ipsi non sunt Culpabiles in Trespass against Baron and Feme. Levins for the Defendant, that this was pleadable as a Lease and demurrer might have been for not doing so, and if it had been found the Plaintiff did License to Baron and Feme, it had been good, but not in the Negative, for the Defendants plea may be true; and the License to the Husband, albeit not to the Baron and Feme, & per Curiam, the Replication is ill: And Judgment reverst. (48) Baron & Fem.

Warner *and* White. *Mich.* 28 Car. II. *Rot.* 543. Ante.

COndition if Warren pay 70l. to the Defendant, or if the Defendant procure Warren arrested, by the Plaintiff Sheriff of London to be delivered into their custody: The Defendant pleads that before the day Warren died, to which the Plaintiff demurred: And by Polyxphen for the Plaintiff, that the Bond is forfeit on 3 Cr. 864. and Lamb. Case, 5 Co. 53. and 1 Cr. 339. Barbers Case, and this is not like to Laughters Case, for here the Defendant hath undertaken for a Stranger; and so Moor 337. pl. must undergo all hazards: Contra where I undertake for my own acts, as in C. B. 1653. Huntly and Allen, where Money is to be paid, that is not discharged by death; and so Brantingham and Ure in C.B. against Laughters Case; but the Court inclined strongly that by the death of the stranger the Defendant was excused. Sed adjornatur. 770. pl. 9. (49) Obligation.

Astree *and* Ballard.

ON Scire Facias the Defendant pleads that one of the five persons against whom the Judgment was, was in Execution; to which the Plaintiff demurred. And by Saunders on render of one, the Bail is discharged, and he is as well discharged here, it being now become impossible for the Defendant (50) Bail.

Defendant to render all, 3 Cr. 618. Dyer 45. b. and 1 Inst. 286. but per Curiam, this Execution against one is no satisfaction; and the Defendant might bring in the Rest, and his Recognizance being to render all five, its broken by not rendering the rest; and after Execution by Scire Facias against Bail, the Principal may be taken by new Capias, and both be in Execution being on several Judgments. And Judgment for the Plaintiff.

Hickman *and* Snell. *Trin.* 29 Car. II.
Rot. 28.

(51) Religion.

IN debt on 1 Eliz. Cap. 2. §. and 23 Eliz. Cap. 1. §. 5. for not coming to Church: The Defendant pleads that he did not abstain from Church without reasonable cause, not saying what, & hoc paratus; to which the Plaintiff demurred, & per Curiam its ill; but being laid in the County of Warwick for not coming to Church in Noneaton, being Inhabitant in Coventry another County, on 31 Eliz. Cap. 5. this is a good Plea, albeit on 21 Jac. Cap. 4. §. 4. as to Popish Recusant Information may be in any County. But by Saunders the shewing of Inhabitancy was only to entitle the poor to the forfeiture, by 23 Eliz. Cap. 1. §. but the offence is laied in the County where its committed, and the Statute of 31 Eliz. Cap. 5. §. 2. never allows such a Traverse as this, absque hoc, that the Defendant absented from Noneaton in the County of Warwick; but per Curiam, this is a local Action, and as laid ill, being that the Defendant Inhabitant of Coventry went to no Parish there, nor within the County of the City, but absented at Noneaton in Com. Warwick. And Judgment for the Defendant, Nisi.

Grover *and* Panton.

(52) Condition.

DEbt on a deed for 20 l. on delivering all the Goods taken as distress for Rent of one Locke: The Plaintiff avers that he did deliver all the Goods; the Defendant sheweth he did not deliver all, not saying what were delivered or what the Goods were; to which the Plaintiff demurred, & per Curiam the Plea is ill. And Judgment for the Plaintiff.

Pullen

Pullen *against* Batts *and* Uxor.

TRespass against the Defendant of an Assault, simul cum Bennet, The Defendants plead Son Assault on them, The Plaintiff sheweth forth a Writ taken out against the Husband; to which the Defendant demurred. Because 1. the Writ is not said taken forth against the Defendant, simul cum Bennet: Sed non allocatur. 2. The Replication is only of arrest of the Husband: Sed non allocatur, the Wife coming in after the assault begun, and need not be de injuria sua propria as to the Wife: Judgment for the Plaintiff, Nisi. (53) Trispass.

Gardner *and* Sedgwicke. *Mich.* 28 Car. II. *Rot.* 507.

AUd. Quer. on Escape of the Testators debt, or and recovery against the Marshal; The Defendant, protestando, that the Plaintiff escaped after the Defendant recovered against the Marshal, and the Plaintiff did not pay the Marshal absque hoc, that Marshal paied and satisfied the Testator; to which the Defendant demurred, because the Plaintiff is Barred by the Judgment, 2 Inst. 235. and the paiment by Marshal to the Creditor lieth best in the Defendants notice, as 1 Cr. 240. Robinson and Clayton, and the party by suing Marshal hath made his Election. Saunders for the Defendant, That this case differs from all the others of escape by consent of the Goaler, 1 Cr. 109. in Escape Br. 12. this is not purely debt that goeth over to Executors, but is grounded on a tort gone by death of the Goaler. Wild doubted, this being a new case and a degree farther than any yet; but the Court inclined strongly that recovery against, nor the paiment to Marshal was no discharge of the Plaintiff in this Aud. Quer. but Adjornatur to take Issue on paiment by Marshal to the Creditor, viz. the Defendants Testator. (54) Escade.

Bull *and* Knight.

MR. Solicitor Finch plaied treble Costs on 13 Car. 2. Cap. 3. in Trespass against the Kings Officer collecting the Hearthmoney, as in 13 & 14 Car. 2. Cap. 10. §. 14. is given to the Constable, which Livesly Secondary had refused to give, because the Constable may still collect at the Kings election, and no treble Costs are given to the Kings Officer: Sed adjornatur. (56) Costs.

Dominus

Dominus Rex and Clerk.

(56) Slander.

MR. Attorney Jones prayed procedendo in Inform. by Custom in the City to disfranchise for opprobrious words, That Lawrence was a Knave, spoken of an Alderman, which they opposed, because hereby the Aldermen would be judges in their own cause. 2. Inform. as Latch 232. Alderman Lumlyes Case there Wright submitted, yet Information in name of the Common Serjeant is against Law to prosecute for the City, but should be pro Domino Rege, being a Court of Record: But per Curiam Procedendo awarded, Nisi; the words being not actionable without Custom, and an Alderman may withdraw, and the rest try; contra of a natural body to be Judg in propria causa, and custom to disfranchise for words, good, being confirmed by Parliament. Post.

Mayhur *and* Try. Ante.

(57) Merchants.

MAynard for the Defendant, that this is a Monopoly to have the sole Registry of Names 12 d. of all persons going beyond the Sea, except in London, at all other Ports for two years, and so the Under-lease to the Defendant, and Covenant thereon to pay a 100 l. per Annum during his term, void on 21 Jac. Cap. 3. §. 2. not only the Patent it self being thereby void, but all other interests depending thereon. Et adjornatur.

Dominus Rex and Humphries. Ante.

(58) Maintenance.

ON Affidavit That Copy taken at the Rolls was 10 l. as in the Printed Statutes 32 H. 8. Cap. 9. §. 3. and not 40 l. as before was sworn, the Court discharged the Defendant upon payment of 10 l.

Helder *and* Brudal. Ante. *Monday*, May 28.

(59) Payment.

TRemayn excepted in Arrest of Judgment on 1 Inst. 128. & 1 Roll. Tit. Continuance, & 2 Anders. 6. Pl. 4. in debt on Obligation, the Defendant pleaded solvit ad diem, & hoc petit, &c. as Yelverton 137. & 1 Cr. 164. 316. & 2 Cr. 588. where it should be, & hoc paratus, which per Curiam is ayded by the Verdict. In debt on Obligation condition, to pay so many pieces of Eight on sight of Bill within four days: The Defendant pleaded payment, & hoc paratus: The Plaintiff

tiff replied that he sent other Bills which the Defendant did not pay, absque hoc that he pleaded as in the plea, & hoc petit quod Inquiratur; and Verdict for the Plaintiff, and Judgment.

Dominus Rex and Infield.

(60) Corporation.

EX motione Mr. Attorney Jones, that the Mayor of Canterbury might set his hand to a Return of Mandamus, which Hards the Kings Serjeant opposed, the Return being in under the Common Seal: To which the Court agreed, preter Twisden, who said the Mayer must sign it. Et adjornatur to see Precedents.

Astree *and* Ballard. Ante.

(61) Bail.

MR. Attorney Jones shewed cause against the Judgment, that the plea is good, and if any Principal be taken the Bail is discharged, 1 Roll. 897. albeit after taking one Principal or Bail, the other may be taken; also the Plaintiff by taking one hath deprived the Defendant of bringing in all according to the condition of Recognizance: Twisden contra. Sed adjornatur. 766 pl. 1.

Against Elborough.

(62) Merchants.

IN action upon the Case on Custom of London, that any Merchant or other Inhabitant there subscribing a Note for payment of money to any other, not said where inhabiting; on default of payment by him on whom the Bill is drawn should pay, &c. Thomson excepted in Arrest of Judgment, that no action lyeth as between Merchants it doth, sed non allocatur, for per Curiam there is as much reason for Inland Bills as for Bills of Exchange, and this is no more, and being averred that the Defendant is an Inhabitant in L. &c. Judgment for the Plaintiff.

DE
Termino Trinitatis

29 *Car.* II. in *B. R.* Anno 1677.

Friday, June 15.

Rainsford Ch. J. & *Wild.*
Twisden. & *Jones.*

Astree *and* Ballard. Ante. 765 Pl. 61.

(1) Bail.

MR. Attorney Jones shewed cause against Judgment in Scir. Fac. on Recognizance against the Bail for five Principals, on plea in Bar, that before the Return of a second Scir. Fac. the Plaintiff had by Testatum taken one of the Principals in Execution, because hereby the Plaintiff hath determined his Election, 1 Roll. Abridg. 897. and there can be no difference between taking one Principal and all, 2 Cr. 320. and so 2 Boulstr. 68. as when Suit is taken, 2 Inst. 235. against the Executor the Heir is discharged by Levins for the Defendant; Rainsford Chief Justice, If one of the Principals render himself this is no discharge of the Bail, which the Defendant agreed. Twisden Justice, That the taking one hinders not to take the rest; and this the Defendant should have done, and pleaded this specially as to the other. Sed adjornatur.

Vertue *and* Bird.

(2) Assumpsit.

ACtion upon the Case on agreement to carry Corn from A. to Ipswich in Suffolk, not said when, and to deliver it there at such place as the Defendant appointed, averring that he carried the Corn such a day, and gave notice thereof

thereof to the Defendant, and that he did not appoint any place, whereby he caused four of the Plaintiffs Horses to catch diseases and die; after Verdict and Judgment stayed, Holt on 1 Roll. & Dyer 22. b Pl. 138. prayed Judgment, the Defendant being the occasion of the not performance of the agreement shall answer for the consequential damage; Sed non allocatur, for the Plaintiff might have taken his Horses out of the Cart, or have laid down the Corn any where in Ipswich, per Curiam, and Judgment stayed.

Audly *and* Wells. *Saturday*, June 16.

(3) Bail.

IN debt on Recognisance of Bail, Special Verdict find an Information before the Sub-commissioners of Excise in name of Coulston, and Judgment thereon, which on Appeal was reverst by Sessions, and Costs given against the Defendant, who was the real Prosecutor, and Coulstons name only used, and if by 15 Car. 2. Cap. 11. §. 19. the Defendant be lyable to the Costs, was the Question. And by Saunders for the Plaintiff, He shall, the Costs not being given against the Informer, but against the Prosecutor, which must be intended of the real Prosecutor, and not he that was only nominal, but he that had actually done the wrong; but the Defendant was appointed by Commissioners to Inform as well as Coulston. By Mr. Solicitor Winnington the Issue is a Traverse that Coulston was the Prosecutor, absque hoc that Wells the Defendant was so, and its found that Coulston in proper person exhibited the Information to two Justices, on whose refusal he Informed the Sub-commissioners, and on Judgment a third part is given to Coulston, but for benefit of the Defendant, and upon appeal to the Sessions notice is said to be given to the Defendant Wells, and the Justices declared Wells was a visible Prosecutor, but Wells is not found the original Prosecutor, which are the words of the Act; but by Jones Justice its found the Defendant directed the Information, and its found the Judgment was for the benefit and on solicitation of the Defendant; and by Raynsford, it were mischievous if the Defendant should not be answerable for the Costs; but by Twisden exhibiting Information is but evidence of Prosecution, but no actual prosecuting, so much less the soliciting, and Judgment cannot be on this Verdict being imperfect. Et adjornatur. But on Indictment the Solicitor is the Prosecutor, &c. Post.

Dominus Rex and Harvey. *Monday*, June 18.

Ale. (4) POlyxphen excepted to the Indictment on 4 Jac. Cap. 4. §. of Brewers selling Drink, May 1. to one Alice H. and that she retailed the same ad tunc, not being licensed, not averring Alice was not licensed at the time of the Drink delivered, and it was quasht per Curiam.

Harker *and* Moreland. *Hillary* 27 & 28 Car. II. Ante.

Administrators. (5) IN Scire Facias by the Administrator Teste 12 February, the last day of the Term on Oyer prayed of the Letters of Administration, it appeared the Letters bear date in March before Easter Term, which after general Imparlance was pleaded in abatement; & per Curiam, no Action lyeth but in the Term subsequent, unless it be by Judicial Writ which may be Teste at any time of Vacation, and so Wild said was adjudged in C. B. on his so pleading; and Judgment for the Defendant, Nisi, &c. After Levins for the Plaintiff prayed Judgment against himself for expedition.

Turingham *and* Gray. Ante.

Leases. (6) IN Covenant on Indenture of Lease for three years if J. S. so long live, and after that for three years, & sic deinceps de tribus annis in tres annos, so long as J. S. live; The Defendant pleads that at the end of nine years sursum reddidit & reliquit, not alledging any place; To which the Plaintiff demurred; & per Curiam, this is but a Lease for nine years, and so the time is efflux, and there need no place of surrender, nor any surrender at all be alledged; and it cannot be a Lease for twelve years, for this would make a Casm of three years, as on Lease from three years to three years, which is a Lease only for three years in reversion at the end of three years, but a Lease for three years & sic Deinceps de tribus annis in tres annos, is for six years. And Judgment for the Defendant.

Bechino

Bechino *and* Gumly.

IN Assumpsit quod Cum quidam------Alison was indebted to the Plaintiff for Wares sold, the Defendant in consideration the Plaintiff would forbear, the Defendant would pay if the said-----Alison did not pay: After Verdict, and Judgment in the Marshalsey, Error was assigned that no Christian name was alledged, sed non allocatur, on 2 Cr. 258. 261. because he may be a Jew or an Anabaptist that hath no Christian name, and the forbearance only is the ground of the Action; and were it on consideration of forbearance of one unknown to whom the Plaintiff sold Goods, this is good, as Indictment of stealing Goods de quodam ignoto, because the stealing is the substance; and though the Defendant might have demurred for want of certainty of name, yet after Verdicts it well enough: Twisden contra, That the Plaintiff must aver the certainty of his Christian, or Prenomen, and Verdict aids it not, which Rainsford Chief Justice agreed, no more in Suit against the third person than against the person himself to whom the Money was lent, or Goods sold, and it cannot be intended that quidam was the Christian name, it being with a blank, &c. and the Court being divided, Adjornatur. (7) Nosme.

Trip *and* Rands.

ACtion upon the Case on Marriage of the Defendants daughter: The Defendant in consideration the Plaintiff would procure himself at the Defendants request at his own charge to be made a Knight, the Defendant would pay a Thousand pound down, and a thousand pound future, &c. discounting interest. After Verdict and Judgment, Error was assigned that its not said the Plaintiff did this at the Defendants request, 1 Cr. 386. Palmer and Knight, Jones 15. 194. and 2 Leonard. 53. but being that the Plaintiff fidem adhibens promissioni & licet sepius requisitus, its sufficient after Verdict on non Assumpsit, which must prove him Knighted at the Defendants request, the request being executed, and Judgment affirmed. (8) Assumpsit.

Parker

Parker *and* White. *Mich.* 28 Car. II.
Rot. 543. Ante. 761. pl. 49.

Bail. (9) DEbt on Obligation, condition if Warren who Arrested Stubs at the Suit of Warner, pay to the Plaintiff, &c. or if the Defendant render the Body of Stubs to the Sheriff of London in convenient time to declare against him. The Defendant pleads that before Octob. 25. Stubs died; the Defendant demurred, and Polyxphen on 5 Co. Laughters Case, 3 Cr. 399. and Moor 357 Pl. that both parts of the disjunctive condition were become impossible, and though it be said in the Case it was no ground for the Judgment that the discharge of part discharged all, and Dyer 292 pl. is not a disjunctive condition, but one part precedent to another, and 15 H. 7. 2. Bar 60. do not prove this, but Huntly and Allen, Mich. 1655. in C. R. against Laughters Case, adjudged a discharge of part is no discharge of all, 3 Cr. 864. but obligor must perform what he can, as 4 H. 7. 3. whither it be to Infeoff A. and B. or A. or B. on death of one the other must 15 H. 7. 2. b be Infeoft, and hereby the Executors and Administrators are rejected, and the sense is only that Warren pay by Octo. 25. and if he do not, then if he render the body, the Obligation to be void, this were not discharged by death, no more here. 2. The Action is discharged by letting the party go; but per Curiam this is a discharge of the Writ only, not of the Action, so the condition to render so as to answer the Plaintiffs action is well enough. Symson for the Defendant, That where a liberty is to two things, discharge or impossibility of one dischargeth both. Wild Justice said, That in 5 Co. both Acts were to be done by the Obligor himself to the Obligee, but here the Obligor undertakes for a third person, which differenceth the Cases, and this differs not from Walmsleys opinion 3 Cr. 399. for its either Warren his Executors or Administrators shall pay by Octob. 25. or he would render the Body, &c. Twisden contra, that here both acts, payment or render, are to be at the same time, therefore discharge of one is a discharge of both, as 5 Co. Laughters Case; contra if the acts were to be done at different days. And by Jones Justice, both parts of the Condition are for benefit of the Obligor, and it differs not from the ordinary cases of Bail to pay or render the body, which is discharged by death of the Principal before the day; and 3 Cr. Greningham and Ewr, and in action in this Court on Obligation, condition

on

on to run a Race, or pay by a day, it was adjudged that the Defendant was discharged by the death of the Horse. And Judgment for the Defendant, Nisi.

Suer *against* Beerback *and* Arnold.

(10) Bail.

IN Scire Facias against the Defendants as Bail. The Defendants pleaded that they were the same who wer esum-moned by the Sheriff, and that they were not the same persons who were Bail, but others of that name entred the Bail, to which the Plaintiff demurred, and Judgment for the Plaintiff, the Alii not being said of the same place as the addition of the Bail was.

Edw. Addison *against* J. Otway.

(11) Lieu.

IN Ejectment on Lease of Robert Braithwait Special Verdict find that Gawen Braithwait Esquire, was seised in Fee of the Lands in the Declaration, and made his Will in writing in hæc verba prout, That Gawen had Issue three Sons, Thomas his Eldest Son, and John his second Son, who died in the life time of his Father, leaving Issue only Elizabeth his daughter and heir, who married the Defendant Sir J. Otway, and Robert his third Son, that after the death of Gawen Braithwait, Thomas entred into the Lands in question, and became thereof seised in Tail, and being so seised the said Thomas Braithwait having an intention to suffer a Common Recovery of the said Lands in the Declaration, did to that purpose by Indenture dated 13 Jun. 1657. and Enrolled according to the Statute, grant, bargain, and sell the said Lands to the said Defendant Sir J. O. and his Heirs by the name of J. Otway Esquire, thereby to make the said Sir J. O. Tenant to the precipe of the Freehold for suffering the said Common Recovery; That the said Indenture is in hæc verba prout, &c. that in pursuance of the said intent a Common recovery was afterwards suffered prout the Recovery; That it was the intention of all the parties in suffering the said Common recovery that the Lands in question should be comprised in the said Common Recovery, and that the Recovery should be suffered of the same; That all the Lands in the Declaration lye in the Parishes of Rippon and Kirby Malzeard, and out of the Mills of Rippon and Kirby Malzeard, and that there is a Mill called Rippon in the Parish of Rippon, and a Mill called Kirby Malzeard; That afterwards the said Thomas Braithwait died 30 Novemb. 1674. seised of the said Lands without Issue, and that the said Dame Eliza-

Elizabeth Otway is his Cousin and Heir; That after the death of the said Thomas Braithwait the said Sir J. Otway her Husband entred into the said Lands in her right, and became seised prout lex postulat, That the said Robert Braithwait did afterwards enter into the said Lands and made the Lease in the Declaration mentioned to the Plaintiff, and that the Defendant Sir J. ejected him as in the Declaration, & si super totam materiam, the Law be for the Plaintiff, for the Plaintiff, and 6 d. damages, and 40 s. costs, and if for the Defendant, for the Defendant, &c. Serjeant Shafto for the Defendant, That this Deed and Recovery is but one Conveyance, and it being found the Lands are only in the Parish, and that the parties intended to pass them, albeit otherwise Rippon, &c. should be intended a Mill, yet now they shall pass. Which North Ch. Justice, before whom the Special Verdict was found last Summer Assizes at York agreed, and that it would be of dangerous consequence not to pass them, which Windham Justice agreed, the intent being expressly found, the Court cannot say it was not the parties intent to pass them. Atkins Justice ad Idem, Albeit originally Parishes were only of Ecclesiastical cognisance, yet now its a name known and used in our Law; and albeit Rippon generally be intended a Mill, yet not so as it cannot be intended of a Parish also; and sithence Seign. Cromwells Case its setled that the Deed and Recovery are but as one Conveyance. 2. Also the death of the Pr who is but a Nominal person is no reason for the Court to stay Judgment contra to agreement of parties, that other causes tried at the same time should attend the Issue of the Judgment on this. Scrogs Justice, That the parties are by the Verdict estopt to say this was not the intent of the parties to pass the Lands in the Parish, as Fine by Infant is reversible only during non-age, but his Deed or Feoffment is always voidable: but if he avoids not Fine during non-age, he shall never avoid the Deed that declared the uses of the Fine, because all are but one Conveyance, and therefore is an Estople; so here, and Judgment for the Defendant, Nisi; no body attending for the Plaintiff, and after it was argued thrice, yet Judgment for the Defendant.

Dominus

Dominus Rex and Nithingal. *Tuesday*, June 19.

LEek on Smiths Case cited 9 Co. 118. b in Seign. Zouch's Case, excepted to an Indictment of Forgery taken before the Justices of the Peace of the West-Riding in Yorkshire, concluding contra form. Stat. being Coram non Judice; but being for Forgery the Court refused to quash it, but left him to demur or plead. (12) Forgery.

Plummer *and* Whichcot. Ante.

RAynsford Chief Justice delivered the opinion of the Court, that as this Case is Judgment cannot be for the Plaintiff without a new Venire Facias, the Declaration being that D. was insufficient at the time of the Lease and the Commitment, and at the time of the Escape, and at all times afterwards; and the Verdict find insufficient when Goal was committed, and when Escape was, but do not find insufficient when Action was brought, which is necessary on W. 2. Cap. 11. to make the Superior chargeable as well as insufficiency at time of Escape, and this not being found, nor nec unquam postea the Escape, albeit the Court inclined strongly that the Superior was chargeable, yet would deliver no express opinion as to the main, the conclusion being si super totam materiam, & tota materia is not found; but Twisden Justice said, Superior was chargeable expressly, and Venire Facias de novo Awarded. (13) Escape.

Robinson *and* Woolly. Ante.

EJectment on Demise of Stares by Special Verdict find Christopher Guise Patron of Missenden, that in the Vacation of the Bishop of Glocester the Archbishop was Guardian of Spiritualties as by Common Law he is of all the Churches, but only the Cathedral, and of that the Dean and Chapter is, so that he on presentation instituted the Plaintiffs Lessor, and gave Mandate to Induct, after which new Bishop was made before actual Induction made, and if pro Plaintiff, pro Plaintiff. Weston pro Plaintiff, that the Induction is good notwithstanding the Election and Consecration of the new Bishop: This is a question of the Cannon-Law, which consents with our Law in this matter, and on (14) Encumbent.

Mors and Slew; this Court will take notice of the Cannon-Law as well as theirs of the Civil Law, Hob. 185. Jones Case, the Archbishops Jurisdiction opens within the Bishops Dioces on many occasions, as on Visitations, wherein what was before the Bishop is taken up per modum retroactus, and so leaves it again to the Bishop: 1665 in C. B. in Thickens and Collins Case, where promulgation of sentence for Adultery was by the Archbishops Commissary in Essex; also by their Law there is intermediate Appeals for the partiality of the Judg, in which Case Arbiters shall be assigned, and after this proceeding the first Judg shall take up the cause per modum retroactus, Seldens Hist. of Tythes, Lib. 9. Cap. that out of the Archbishop the Suffragans are taken and called Paretiæ, or Parishes; wherefore as what he doth by way of Jurisdiction stands good, so whatever is done by Impression thereof in execution of his Warrant is good, as Cornelius Conrade, that there is no necessity of any new Process, and 11 H. 7. 9. Induction is never pleaded because its a Spiritual matter, and intended to be by him that gave Institution, and is but as an Execution on Judgment at Common Law, which may be made in new Judges time, and the Archbishops authority is but per modum Judicis, so to be favoured as executed by the Archdeacon, Linwood 141. by Jurisdict. ratione officii, rather than Mandati, for else the Archdeacon could not as here make Letters to other Ministers to Induct, for Delegata Potestas non Potest Delegari: Also the Act of the Archbishop is at most 5 Co. 30. Jeffries Case, only voidable, and must be appealed from, so the Plaintiff is well in possession as to taking profits, Pl. Com. 528. on 38 Ed. 3. 3. had the Induction been void a Duplex Querela would have laid after an Inhibition, yet only a Quare Impedit lay upon Co. Trollops Case, Bishop Elect might have made an Inhibition for cause, but here being none, and 1 Inst. 181. Yelverton 25. Hull. 125. King and Heb, this a Mandate for execution of Justice is not to be resembled to Cases of private commands: Saunders for the Defendant, That the Verdict hath found no Induction, the Mandate being to Rich only, and in his absence universis & singulis, and the Induction is made by Rich and three others; which Twisden agreed, but Curia contra. 2. The Jurisdiction of the Guardian of the Spiritualties is determined, so what is but derived thence ceaseth, and this is but an authority, and as well as it may be executed in two months after a new Bishop, it may be twenty years; and its as Arrest by Baily by Warrant before, made after the Sheriff is discharged, which only excuseth by want of notice, but is in it self void, and this

this could be only as a private authority in the persons to whom its assigned, not as Archdeacon, but with recital of the Mandate to him by Gardian of the Spiritualties, so ceaseth with it, for the Archdeacon might have done it himself. Twilden and Wild said this was a very doubtful case, for as the Institution could not be by the Guardian of the Spiritualties after the new Bishop made, so neither could he induct, and hereby there must be a relation to the first Mandate, which is not reasonable. Sed Adjornatur.

Johnson *and* Wicherly.

(15) Pardon.

SAunders, Special Verdict find conviction, on 13 Car. 2. Cap. 1. §. 7. and 25 Car. 2. Cap. §. of Pardon, and that between the conviction of the lessor of the Plaintiff, and the Pardon there were three several presentations, &c. that yet the party is restored to the profits, albeit not to the possession against those Presentees, ab initio; but per Curiam, the party on 13 Car. 2. Cap. 1. §. shall be restored if he can be restored, but to what is disposed actually away before, he cannot, and especially here some of the words being against the Kings regal Power is excepted in 25 Car. 2. Cap. 5. §. 8. And Judgment for the Defendant. Nisi.

Howlet *and* Carpenter. *Trin.* 29 Car. II. *Rot.* 317. *Thursday*, June 21.

(16) Copyhold.

SPecial Verdict find the Dean and Chapter of Westminster seised of Westhamsted, and that one Carpenter in 19 Jac. levied a Fine of Lands held thereof, and five Years passed in the time of Williams the former Dean, which in the time of Dalby Successor was presented as a forfeiture, and thereupon the Dean and Chapter granted by Copy to the Defendant. And Serjeant Barwell for the Plaintiff, on 11 Co. 78. that as Magdalen College Case, 1 Roll. 162. 2 Inst. 516. this Fine barrs not the successor: And Judgment for the Plaintiff, Nisi, the Conclusion being that if this be no bar, for the Plaintiff, and by 13 Eliz. Cap. 10. §. the Successor cannot be bound.

Aſtree *and* Ballard. Ante.

(17) Bail. SYmſon for the Plaintiff, That this is no good Plea, only one of the Principals being taken is no ſatisfaction, and the difference between this and 2 Cr. Higgins Caſe, is that where there are ſeveral Principals all are liable, and the Recognizance not ſatisfied by taking or render of one, wherefore on Blumfields Caſe, the taking one is no diſcharge. Levins for the Plaintiff, that this depends on the reaſon of Elections, where taking one is diſcharge of the other. Rainsford Chief Juſtice, Paſch. 28 Car. 2. Orlibere and Norris, the Bail in Execution, and after the Principal taken in Execution, and well; ſo render of one would not diſcharge the other, which was agreed, becauſe until the Plaintiff accepted him he is not in Execution. But by Wild and Jones, here one of the Principals is firſt taken, before the Return of the ſecond Scire Facias, and the Bail is but in aid of the Principal, therefore, though the Bail be taken it hinders not to take the Principal; and after taking the Body of one of the Defendants, one cannot take Goods of another, and by this taking one it becomes impoſſible for Bail to render all; ſo Freemans Caſe, and Bail had liberty untill the Return of the ſecond Scire Facias to render: Alſo here is no Judgment againſt the Bail, but this is pleaded to the Scire Facias, which muſt be againſt all: And to this Twiſden inclined. Sed adjornatur.

Smith *and* Tracy. *Paſch.* 28 Car. II. *Rot.* 533. Ante.

(18) Adminiſtrators. SAunders for the Defendant, that demurred to the Prohibition, that the half Blood ſhall come in with the whole Blood for a diſtribution, upon 22 & 23 Car. Cap. 5. and though in caſes of diſcents the Common-Law takes no other notice of half Blood, but to exclude them, yet as to Goods, Adminiſtrator Br. 47. the half Blood is of Kindred; and ſhall be a Guardian before one more remote; and in our Law as well as the Civil Law, Brother of the half Blood ſhall come in as Brother for the Goods, before Uncle of the whole Blood, or remote Kindred; for the Brother of the half Blood cannot come in any other degree of Uncle or Coſin, but

but he must come in the degree of Brother, so the half Blood is no impediment, 2 Roll. Abr. 303. tit. Prohib. and Stiles 74. agreed, Sister of the half blood was in equal degree with the whole; and here cannot be two degrees, one in the Brother of the whole Blood and another in the Brother of the half Blood, so that the whole should be first preferred, and after the half Blood; and the Statute of 22 & 23 Car. 2. Cap. §. is that the Ordinary shall compel according to the Laws Ecclesiastical, and in C. B. on this reason a Prohibition was denied. But by Twisden in Browns Case a Consultation was granted; for it came by Appeal to the Delegates, who held the whole Blood shall be preferred. Wild Justice said, if the half Blood be next of Kin to have Administration, he shall have distribution. Winnington Solicitor for the Plaintiff, where there are Children of the half Blood, Quoad the Parent, if distribution were demanded of the Father or Mothers Estate they are equal. But by Wild, the Parents cannot have Children of the half Blood; but Children by several Venters who are of half Blood as to each other, and so shall not inherit each other, nor have distribution as equal to each other, as Bendloes Case, pl. 133. and 2 Roll. Abr. 303. albeit as to their Parents Goods, they may have distribution, and the difference in Lands and Goods will make no difference in the representation, which cannot be as to each other, as 21 H. 8. Cap. 5. §. in Dyer 372. Isteds Case, devise of residue entitles the Legatee to Administration, notwithstanding the Statue, because the presumption of the Statute, that the Testator would have given it to next Kin is hereby Dusted, and by the same reason this implication is as strong: for the whole Blood the Court agreed as to the Parents, all the Children by several Venters shall have distribution. And by Wild Justice it was the intent of the Act, 22 & 23 Car. 2. Cap. §. to set up that Practice which was before used, albeit prohibited by our Law, which was to give the half Blood a share with the whole Blood in the same degree, for as to their Maintenace and Supportation, they are equal; but per Curiam its ridiculous that the half Blood should have but half share; for Brother or not Brother is the question. Et adjornatur.

Norden

Norden *and* Levet. *Hill.* 26 & 27 Car. II. *Rot.* 984. Ante.

(19) Executors.

SCire Facias against Administrator to have Execution on Fieri Facias; the Sheriff Returned an Enquiry, that the Defendant diversa bona Elongavit, & disposuit, and Scire Facias is against the Defendant, Quare Executionem de bonis propriis, and on Issue, non elongavit, &c. Special Verdict find that the Defendant by Indenture Covenanted to pay 600 l. for the Goods of the Intestate then taken in Execution, and if this be a Devastavit for the Plaintiff, if not for the Defendant. Saunders for the Plaintiff, That in Maxwell and Bright on Issue on Elongavit after Verdict, it was excepted that here was no Devastavit, yet Judgment for the Plaintiff, the Sale Conversion or Eloynment, being so that the Plaintiff cannot have Execution he shall have Judgment without finding any positive Devastavit, and therefore prayed Judgment. Maynard the Kings Serjeant for the Defendant, that as to 200 l. there is a positive Devastavit found, and as to part of the rest he agreed that the discharge of a Trespasser is Assets; but here being only an agreement between the Defendant and Hope and no release, nor any thing that is pleadable against a Creditor, nor no alteration of the property of the Goods by any grant, but this is an agreement executory, and its all one as if it were by Parol, for there is no Goods received. 2. As to the Davastavit this is the matter, & Elongavit vendidit & ad usum suum proprium Convertit are Synonimous, which as to Assets its sufficient to alledge either, but no Devastavit unless the Plaintiffs remedy be taken away; and here a new Administrator might on death of the Defendant recover these Goods notwithstanding these Articles, and there is no remedy for the Defendant but by way of Covenant, so it can be no Wast. Wild Justice, if the Defendant had sold the Goods it had been Assets, and its the same reason where its agreed to pay so much for the Goods. And by Twisden had it been Covenant not to sue, it had been a Devastavit, for hereby he hath barred himself, so if the Administrator release to the Executor de Son tort, he is thereby liable himself: Also the Defendant may have debt for the money on Sale by this Covenant, which the Court agree: And Judgment for the Plaintiff, Nisi, albeit Hope had converted before the Defendant had Administration,

tion, and so this agreement only pleadable by way of accord, in case satisfaction had been made, and not else.

Pagit *and* Vossius. Ante.

(20) Devise.

MR. Attorny Jones for the Plaintiff, The Will of Brown is in December 1673, during the Dutch war; That the Testator intended not any Estate for life, but only during his Exile, and until his death or restauration; and if this limitation be void it will return to the prejudice of the Defendant, not of the Plaintiff, if there were no exile; for albeit in Cases where no limitation is made, the Law will imply it during his life, yet where the limitation is express and Impossible, as to B. of full age during his nonage, this shall not be for life. 2. Though here be not a proper Exile found, yet there is such an Exile as the Testator intended, viz. a constrained absence; Extra solum Ejectus, is the most proper signification of Exile, but this is not necessary, as in 23 Car. 2. Cap. 1. and 19 Car. 2. Cap. 10. of Banishment of the Earl of Clarendon, and Sir G. Sands, who were before fled beyond Sea: Also to stay in the Enemies Country is criminal, after the Proclamation, and there was no opportunity of Return until after the War ended; and its not found that the dissatisfaction of the Defendant continues, but only that his Pension was not paid; and its not found for what time it was granted, nor is it found the devisor had notice of the withdrawing the Pension: But the War is notorious in it self, so its more reasonable to apply the being an Exile to the War than to the Pension, for the Exile here must not be such as is voluntary, for its, if it please God to restore him which is done; and the Defendant may return if he hinder not himself, 2 Inst. 53. is only Exile out of a Manor which is not parallel to this of a Country, that being forced, this voluntary. Serjeant Maynard for the Defendant, agreed the keeping back the Pension, no Exile; but its found that superinde, he came into England, so the Exile must be understood of being out of his Country; whither sent out or ejected, or coming voluntarily, which was before the War, so could not begin by that extra solum pulsus or vagus, whether by fear or voluntarily the party absent its Exile, Hotoman de verb. significat. & Lexicon. J. C. tit. Exilium F. N. B. 55. C. and such as the Exile was, such must be the restitution, either voluntary or freedom from fear: Also the Testator mentions nothing of the War. And 2. the Testator intended an Estate for life, until the Exile were

were taken off; therefore if it be incertain what Exile is meant, the Estate for life shall stand, and all the conjectures be void for incertainty, as 3 Cr. 509. to such as shall be reputed Sons, and Leonard. 23. and that kept him out, that drove him out at first, and its found there was no restraint upon him. Wild said the Testator never intended that he should have it as long as he will. Sed Adjornatur.

Mayshew *against* Try. *Hill.* 27 & 28 Car. II. *Rot.* 1172. *June* 22. Ante.

(21) Merchants.

IN Covenant to pay 100 l. per Annum durante termino against the Defendant, the lessee of the Patentee of the sole making and writing of all Passes and Licenses to go beyond-Sea for seven Years. Serjeant Maynard for the Defendant agreed the plea idle; and the demurrer thereon good: But this tending to Countenance Monopoly, the Patent is void, as 3 Co. Colches Case put in Twines Case, being made void by Act of Parliament. Polyxphen for the Plaintiff, The Covenat is only ratione Inde, to pay during the term, in which case if it were a Monopoly, and that nothing passed, yet no Statute voids Collateral Covenants, as this is. Wild Justice, every man cannot go beyond-Sea that will; Twisden contra, that any man may travail that is not prohibited by ne exeat regnum; but per Curiam, if this be a Monopoly the Covenant must fall to the ground. Sed Adjornatur.

Gardner *and* Sedgwick. Ante.

(22) Execution.

IN Aud. Quer. on paiment by the Plaintiff, of the money recovered against the Plaintiff to the Marshal, who had him in Execution in debt on Bond of 200 l. for paiment of one; after demurrer, the Court were of opinion this was no discharge; whereupon the Defendant pleaded that the Marshal nor the Plaintiff paid not the 200 l. to the Defendant. And now Serjeant Peberton prayed Issue might be on the paiment of the 100 l. principal to the Defendant by the Marshal who received it, which the Court granted.

Winn

Winn *and* Winn.

ERror of Fine in the Grand Sessions in Merionith, was assigned for want of Teste of Writ of Covenant; but the Writ of Error being of Fine of six Messuages, three Tofts, and six Gardins; and the Writ of Covenant is of three Cottages, which per Curiam is not removed: But Adjornatur, to see whither the Certificate of the Transcript be right. (23) Wales.

Lee *and* Harvy. *Mich.* 28 Car. II. *Rot.* 236.

SCire Facias on Judgment in Burghbort the in Chester, for the Defendant, which was Reversed before the Justices there, and both Reverst by Error here; The Defendant pleads that no Capias was, on Hob. 116. Harvys Case, sued forth against the Principal before the Scire Facias; The Plaintiff replieth that he sued forth a Capias which was Returned 1 Roll. 135. tit. Bail, non est Inventus; to which the Defendant demurred, And if the Bail below shall be liable to the increase of Costs here, was the question. And Thomson upon the former authorities said for the Defendant, that they should not. Ward for the Plaintiff, That the Reversal of the Judgment of the Justices of Chester, was only for the misawarding the Venire Facias for the damages of increase, and this Court having given such Judgment as the first should, the Bail below are liable; to which the Court inclined, and adjudged for the Plaintiff that they were. (24) Bail.

Collins *and* Beal.

IN Action upon the Case against the Defendant, Attorny of the Court for arresting the Plaintiff by Attachment of priviledge in ac etiam Billæ of 200 l. the Defendant at the time of the Action having no just or reasonable cause; to which the Defendant demurred, because false imprisonment lieth if illegally detained, as alledged, and it may be the Defendant had cause to less value, as Sherman and Howkins Case, where Judgment was set aside. West for the Plaintiff, on Stribling and Anthony. And Judgment for the Plaintiff, Nisi. (25) Arrest.

Read *and* Reynalds.

(26) Dayes. Birch praied to Vacat an arrest being made on Sunday, since 29 Car. 2. Cap. 7. §. which the Court refused to do, and left him to plead the Statute for his discharge; & per Curiam, the Warrant given hereon to an Attorny to appear, shall not be Vacat, but only the arrest discharged, and the party delivered.

Browning *and* Denham. *Saturday*, June 23.

(27) Accord. IN Indebitat. Assumpsit for Wares sold, the Defendant pleads that Post Exhib. Billæ, there was an accord that the Defendant pay 20 l. which he paied, and the Defendant received; to which the Plaintiff demurred. And by Richardson for the Plaintiff, this is an ill plea, being after the Bill Exhibited, and not said Post ult. contin. Sed non allocatur, being pleaded in Bar the same Term of the declaration delivered, its well enough, and a good Bar without saying Actio non. Sed Adjornatur. 786. pl. 39.

Dominus Rex and Burnivil.

(28) Trades. SPecial Verdict on Indictment of the Defendant, an 5 Eliz. Cap. 4. §. Find that this place was two Miles off any Corporation and among many Poor; and that the Defendant sold divers Grocery Wares in small parcels, and if this were a Grocer within the Statute, for the King. Twisden Justice said that the Statute was ment only of Corporations, and Pasch. 21 Car. 1. Rot. 246. inter filax Indictment Hagermans Case, Aromatarius Angl. a Grocer was quasht being out of the Corporation. Et adjornatur. 790. pl. 45.

Dominus Rex and Thomson. Ante.

(29) Slander. THomson conceived the Action lay without Scienter the Goods were stolen, because the party may be defamed, and yet is not Indictable as accessary, which cannot be without particulars; and here the Defendant was acquitted at the Old Baily, because particulars may be proved; & per Curiam, being a Common receiver is sufficient for Action upon the Case. And Judgment affirmed.

The

The Corporation of Ironmongers *and* Naylor. Ante.

(30) Taxes.

TWisden Justice on 28 H. 8. Cap. §. that all Fines be void, held all Houses charged that are not excepted, which the Court agreed, the charge being on the Houses, which if full, is on the Tenant, if not, on the Owner: And Judgment for the Defendant. And Rainsford Chief Justice delivered the opinion of the Court, that there is no later Act that dischargeth new Houses, and by 14 Car. 2. Cap. §. the Owner is to give account of the Chimnies, which is to the end the duty be paid; and that the increase and decrease be known, and by no Proprietor is to be charged above two Years arrears, and in this case the Owner is Occupier where there is no Tenant under him, and though the Owner make no benefit, this might be objected against Houses that have been Inhabited. 2. The Statute doth not confine the King to the House where the duty ariseth, therefore he may distrain at Common-Law in any other Lands of the parties, &c.

The Corporation of Ironmongers *and* Naylor. Ante.

(31) Costs.

MR. Attorny upon the Judgment for the Defendant, prayed treble Costs, which the Secondary had denied, because, though the authority of Constables in 14 Car. 2. Cap. 10. §. 14. give treble costs, the Subsidy Act, 16 Car. 2. Cap. 3. doth not give them to the Kings Officers. Which Twisden agreed, but per Curiam the latter Act is but additional, and the Revenue given by the former: And Judgment for treble Costs.

Baker *and* Baker.

(32) Administrators.

ON Administration below committed to the Wife of the deceast, and an Appeal to the Delegates, where Suggestion was made of an agreement, that the Wife in consideration of Joynture was to quit Administration, which is an evasion out of 22 & 23 Car. 2. Cap. §. and a way of Ecclesiastical Court to try settlements and therefore he prayed a Prohibition, the Ordinary having executed his power to the Wife, which cannot be Repealed by Appeal at the suit of the Mother of the deceased, on Sir George Sands's Case and Offlyes Case, & per Curiam, Suggestion is of matter

matter out of their Jurisdiction, but this being but on allegation, there can be only a Prohibition quoad that, and untill Commission made hereon or other Proces, no Prohibition can be; nor doth any Prohibition lie upon an Appeal by the Mother for Administration after its granted to the Wife, which suspends the Sentence, as it doth not where its by new suit on a new Citation by the Mother, as it was in Sir George Saunder's Case. But Rainsford Chief Justice contra, that Prohibition lieth; which Jones agreed. Twisden and Wild contra, but a Prohibition granted quoad that Allegation.

Dominus Rex and Smartfort.

(33) London. ON Habeas Corpus, the City of London Returned That on complaint of the Corporation of Merchant Taylors, for any members not taking Livery, they by Custom may commit. Against which Holt excepted That 1. this Custom is not good, being no refusal of Office that concerns government of the City; which was the Case of Alderman Langham, 17 Car. 1. March. pl. nor doth it appear how a Livery-man was of influence to the Government, being only to bear charges of the Company which may be but a private Corporation; and they cannot by Custom commit for foreign bought and sold, and 2 Leonard 29 Devered and Ratclif, they cannot commit Bail without Scire Facias; but per Curiam, Coram Glyn, it was adjudged in debt on the By-law that Livery-man was of publick Government of the City. 2. Its not said the Defendant was able to bear this Office, which it must be if this be a publick Office. 3. The Custom is if the Livery-man elected be brought before the Mayor, &c. and he confesseth or answers not what is objected, &c. and its said it was objected he was a Livery-man of the City; which should be that he was a Livery-man of the Company, which was mistaken; & per Curiam, the By-law of the Company was held sufficient for debt for the Fine, and 36 l. was reasonable for refusal, albeit they could not commit, but doubtless the Court of Aldermen may, and a Procedendo was awarded.

Dominus

Dominus Rex and Hutchinson.

3 Mod. 194.

ON Habeas Corpus it appeared the Defendant was committed to Newgate on suspition of Murder in Portugal, which by Mr. Attorny being a Fact out of the Kings Dominions, is not triable by Commission, upon 35 H. 8. Cap. 2. §. 1. N. 2. but by a Constable and Marshal, and the Court refused to Bail him, &c. (34) Coron.

Butts *and* Penny.

SPecial Verdict in Trover of 10 Negroes and a half find them usually bought and sold in India, and if this were sufficient property, or Conversion, was the question. And Thomson, on 1 Inst. 116. for the Defendant, said here could be no property in the Plaintiff more than in Villains; but per Curiam, they are by usage tanquam bona, and go to Administrator untill they become Christians; and thereby they are Infranchised: And Judgment for the Plaintiff, Nisi, and it lieth of moety or third part against any Stranger, albeit not against the other Copartners. (35) Trover.

Ingram *and* Bray, *Bailiff of* Trevill. *Monday*, June 25.

ERror of Judgment in C. B. in Replevin, where the Defendant avowed for Rent and Heriot: In bar of the Heriot, the Plaintiff pleaded a former distres taken by A. and B. and Conusance made by them in the name of the Defendant (not said by his privity) and that a Recovery was had against them; to which the Avowant demurred; & per Curiam, this is no Bar without assent of Trevil, but the Plaintiff could not aver it was not by assent. 2. As to the Rent, the Plaintiff replied by release of all demands, which by Twisden is an Extinguishment of the Rent, on Lit. Sect. 510. but in 2 Cr. 286, 300. its agreed it was no Extinguishment: which Twisden said was against his opinion. 2 Cr. 480. 170. But Judgment for the Avowant affirmed, Nisi. (36) Heriot.

Hancock

Hancocke *and* Hancocke.

(37) Surrender.

DEbt by the Plaintiff as Administrator of Tydbury against the Defendant Executor of another Hancock, conditioned that if the Obligor pay 200l. by the 1st of December 1634, that then the Surrendree Hancock the Testator should reconvey, on request; The Plaintiff alledgeth request 1644; to which the Defendant demurred, & per Curiam the surrender being absolute and trust only for paiment, there being no paiment at the day, this Mortgage is irredeemable. And Judgment for the Defendant, Nisi.

Dutton *and* Pool.

(38) Assumpsit.

ACtion upon the Case by the Husband of the daughter of Sir Edward Pool Tenant for life without Impeachment of Wast, who was about to fell Trees for raising Portions for his Children: And Nevil Pool the Defendant (the Heir at Law) promised to the Father Sir Edward Pool in consideration of forbearance to pay 1000 l. to the Plaintiff. Tinder on 3 Cr. Rippon and Norton, praied Judgment, the Defendant having benefit, albeit he be not alledged Heir: but the release of Sir Edward Pool would be a discharge, and therefore the Plaintiff is a meer Stranger, as 1 Roll. 30. and its not averred Sir Edward Pool was thereby to provide a Portion for the Plaintiff, but only for his Children; which might be others and not the Plaintiffs. Wild Justice, no matter whether he be alledged Heir or not, for such a promise by a Stranger is good, for the Father is Jure Naturæ bound to provide. But Twisden, as Donabies Case, this is a collateral promise, and here is no consideration of intention of Marriage Portion. Jones Justice in Pine and Norwich's Case, in C. B. H. 23 & 24 Car. 2. Rot. 1538. the like promise was held ill: But Adjornatur, though the Mother who was the only Witness, is the Executrix of Sir Edward, so cannot bring the action as on promise to him.

Browning *and* Denham. Ante. 782. pl. 27.

(39) Days.

IN Indebitatus of Pasch. last, the Defendant pleaded that Post Exhib. Billæ, viz. the 12th of February (which was before), that here was an accord that the Defendant should pay to the Plaintiff on the said 12th of February 20 l. which he had paied on the said day; to which the Plaintiff demurred, &

per

per Curiam though the viz. be void, yet the plea in Bar is ill, for the Accord could never be executed on a day precedent to the making, &c. and Judgment for the Plaintiff.

Dominus Rex and Lord Lumly *and* Tempest.
Tuesday, June 26.

LEvins excepted to the Return of Riot, because the two Justices that made the view have set the Fine on 13 H. 4. Cap. 7. which refers to 15 R. 2. Cap. 2. and therefore should be at the Sessions: Sed non allocatur, this being usually done, and the Statute speaks only of sending the record of the Conviction to the Sessions, not the Fine; and the Court refused to quash it, but left the Defendant to his Writ of Error. (40) Peace.

Piers *and* Win.

SPecial Verdict on Devise by Pew to Rice Williams in Tail, Reversion to the Lessor of the Plaintiff, Williams died without Issue, having alienes before to Margaret, &c. Vaughan for the Plaintiff in the Writ of Error, That this is a limitation, as 3 Cr. 919. & Pl. Com. 412, 413. as well on Devise to a stranger as to an Heir; for if a Condition, the Heir should by Entry carry away the Land contrary to the Will, 3 Cr. 370. Baldwin and Wiseman, 1 Roll. 412. Golsb. 152. and Fulmerston and Stewards Case, cited 2 Cr. 592. & 3 Cr. Wellock and Hammonds Case cited in Co. Borastons Case, which is the foundation of all these; and Williams and Fry, which was so also adjudged in Chancery. 2. The limitation is good, Co. Mildmayes Case, the fourth resolution to restrain Tenant in Tail as to Feoffment. 3. The Devise is, That if Williams go about to alien, that then the Devise shall be to the Lessor of the Plaintiff, which is good notwithstanding 3 Cr. German and Ascot, for here the Condition determines the whole Estate, being annext only to the Estate of Williams, whereas the other Conditions were annext to the persons that on alienation by one it should go to another, which cannot be, nor would going about barely discompose the Estate, but the intent was against the alienation. 4. The Feoffment of Williams is found in 1643, and the Lessors Entry is found in 1652, which must be intended within twenty years, especially on 1 Cr. 21. Castle and Dod, here being a special conclusion if the Entry of the Lessor on Marga- (41) Devise.

Margaret be lawful, for the Plaintiff. Williams for the Defendant, The Devise is if my Son Williams go about or attempt to alien, that then from the time of such attempt the use shall be to the Lessor of the Plaintiff, which is not Issuable, but incertain, therefore void, whither it were a Condition or Limitation; on Co. Corbets Case, which was a Devise, as this is; and Toy and Hinds Case, Jones. But Adjornatur.

Forteſcue *and* Abbot. *Trin.* 27. Car. II. *Rot.* 1452.

(42) Deviſe. SAunders on 4 Leond. 196. & 3 Cr. 667. Dyer 129. excepted to a Special Verdict, because it was not found that the Land was Socage, Moor, 279 Pl. because at Common Law no Lands were devisable, so this must be shewed to bring this within the Statute of 32 H.8.Cap. 1. But per Curiam this shall be intended, and so adjudged in the Exchequer in the Lady Baltinglas Case about a year ago. 2. Also the Devise is the same with 2 Cr. 260. being a Devise to John his Eldest Son of the Lands in question, and other Lands to the rest severally, and if either of his Children die, living the others, that the survivors shall have for life, the Son John died, and the three Daughters survived, yet this is a contingent Reversion destroyed by descent upon John who was Tenant for life, and hereby drown'd; and to this the Court inclined: But by Polyxphen here is no express Estate devised to John, so the devise to the survivors is but executory. Et adjornatur.

Taylor *and* Baker. Ante. *Hill.* 28 & 29 Car. II. 268 Pl. 22.

(43) Payment. DEbt on Judgment in B. R. the Defendant confesseth the Judgment and Execution above a year, and not being able to find the Plaintiff, he paid to the Marshal, who thereupon discharged him; the Plaintiff replieth that he did not absent voluntarily; whereupon the Defendant demurred, and Polyxphen for the Defendant, That until of late no Action of debt or Scire Facias lay after discharge of the Prisoner, and this on payment of money was never yet resolved, and in case

case of a Sheriff, 3 Cr. 208. payment is a good plea, and 3 Cr. 390. Atkinsons Case adjudged a good plea, without averring that the Sheriff had returned his Writ; and there is no difference between payment on Scire Facias to save his Goods, and payment on Capias to save his Body of Imprisonment, for none but the Sheriff is compellable to receive the money, and the case of the Marshal is the same; and this was in the Plague year, and done by advise of Counsel. Jeoffryes for the Plaintiff, Its not pretended the Marshal had any express direction to receive the money, nor hath he any authority by Law implied, and the Sheriff on a Capias could not receive the money as he may on Scire Facias, which gives authority to the Sheriff to levy, 1 Cr. 328. nor is the party remediless, for he may pay his money into Court, as 1 Leon. 141. Earl of Lincoln's Case, and have an Aud. Quer. but the Plaintiff were remediless should the Goaler be insolvent, and if he re-receive part for all, no man can avoid such composition, Dominus Rex and Jevan, he on Indictment and conviction of disorderly house was committed to the Marshal for payment of Fine, but before actual imprisonment Fine was paid to the Marshal, yet resolved this was no good payment, and party in Exchequer was forced to pay it over again; and in Hilders Case, supra it was here ruled that payment to the Marshal was not sufficient. Wild Justice, The Capias is ad satisfaciendum, & Scire Facias, or Distringas lyeth against the Sheriff or Executors; and its the constant practice on Scire Facias to be a discharge, and a Capias needs no Return, no more than Fieri Facias, albeit by custom of the Court it be Returned: Jones contra, That party is in fault if he suffer hardship, and in 1 Cr. Garlings Case, the Sheriff himself cannot justifie on Fieri Facias without Return, albeit his Officers may; and its very doubtful whither voluntary payment to the Sheriff on Fieri Facias before Execution of his Goods be pleadable in discharge, much less on Capias, which is ad satisfaciendum the party in Court, not any where else; so here he is committed Quousque satisfaciat parti, not to the Sheriff: which Rainsford Chief Justice agreed, and Twisden absente, Judgment for the Plaintiff, who can never prove contract between the Goaler and the Prisoner.

The Bishop of Carliſle *and* Wells. *Trin.* 29 Car. II. Ante.

(44) Ordinary.

DEbt on Obligation of Urwin Curator or Tutor to one to give an account to the Ordinary, which ſince the Ordinary hath Juriſdiction of Legacies he may well appoint Tutor or Curator as an Adminiſtrator during Minority. 2. The plea that the Bond was taken colore officii will not avoid a Bond taken of the party to do what he ought, as 10 Co. ; Beaufages Caſe, and Co. Entr. 121. a Bond for due Adminiſtration may well be taken by the Ordinary. 3. The Bond is only void for ſaving the Ordinary harmleſs, and thoſe things that are illegal; and Swinborn 96. is that the courſe in York is to take ſuch Bonds. Levins for the Defendant, To give an account of the Infants Goods and Lands, makes the Bond wholly void, becauſe if there be Lands, 1 Inſt. 87. e there muſt be a Guardian and not a Tutor. 2. The Bond ſhould be in the Kings name; the Biſhop of Exceſter and Star, and 1 Roll. 11. a Pradſtons Caſe, a Bond to the Biſhop and Commiſſary was held void. Wild Juſtice, This appears not to be any compulſary Bond but voluntary, and ſo not within 23 H. 6. Cap. 10. but by Hoyl for the Defendant, where ever a Bond is exacted, as here it is 3 Inſt. 149. pleaded it is; Sed non allocatur, alſo as Co. Entr. the Biſhop may take Obligation in his own name; and to this the Court inclined. But Adjornatur.

Dominus Rex and Boniwell. *Wedneſday*, June 27. Ante. 782 pl. 28.

(45) Trades.

WIld Juſtice, That though the Information aver that he uſed no Trade 5 Eliz. yet becauſe this was not ſo found, the Verdict is ill; & per Curiam a Venire Facias de novo, but the Court conceived the uſing the Trade though out of Corporation, and among poor people, is within the Statute 5 Eliz. Cap. 4. §. 31. but by Twiſden Juſtice, This is not contra pacem, as it muſt be in all Informations; which the Court agreed, and Judgment for the Defendant.

Sturges

Sturges *and* --------

DEbt on Obligation Condition to appear Coram Domino Rege Mercurii Craſt. Martini, on Writ then Returned; the Defendant pleads the Statute of 23 H.6.Cap. 10. and that he was taken by a Writ Returned Martis Craſt. Purificat. The Plaintiff replieth that he was taken on a Writ Returned Cras Martini; To which the Defendant demurs for want of Traverſe; ſed non allocatur, but on Bennet and Philkils, and Gold and Cutler, ſupra Judgment for the Plaintiff. (46) Sheriffs.

Wiſe *and* Creek. Ante.

ON 2 Roll. 126. Serjeant Crook prayed to ſet aſide a Rule for Prohibition had, as 2 Roll. Abr. 266. Souths Caſe, on ſuggeſtion that the Chappel of Bodington who uſed only to bury in the Church of Adderly, 8 H. 6. 22. preſcribed to repair the Chappel in diſcharge of the Tax to the Pariſh-Church, 2 Inſt. 266. Seld. Hiſt. of Tythes 266. 1 Roll. Grimes Caſe, 1 Bulſtr. 21. 2 Roll. 290. Hob. 66. on payment of 6 s. 8 d. per Annum, Stanford and Goos, to Mother Church, or keep a Bell, it were a good diſcharge; and the Caſe of Brown and Palfry was not on Demurrer but on Iſſue upon payment to the Mother-Church; and here could be neither, becauſe never any Tax was laid before; Blinco for the Plaintiff agreed the matter of Eccleſiaſtical cognizance, but the repair of the Chappel having no Seats in the Mother Church, but have all Officers diſtinct, therefore 1 Cr. 194. Nichols and Walker is a reputative diſtinct Pariſh, and 1 Cr. Hilton: Jones Juſtice, Albeit the Chappel be thus diſtinct might preſcribe in diſcharge of Tares to repair of Mother Church, that cannot on repair of Chappel preſcribe ratione inde to be diſcharged againſt the Church, which the Court agreed. But Adjornatur. (47) Church.

Dominus Rex and Tempeſt. *Thurſday,* June 29.

LEvins excepted to Conviction of Riot contra form. Stat. 13 H. 4. Cap. which is ill, that Statute referring to a former, and ſhould be contra form. Stat. generally, as 3 Cr. 750. the Juſtices having no power but by relation of one to another. Wild Juſtice, 13 H. 4. Cap. is the Statute that (48) Peace.

gives the power to the Justices of Riot, and 5 R. 2. Cap. is a general Law, wherefore its well enough, which Jones agreed, and they refused to quash it.

The Corporation of Stationers *and* Seymor.

(49) Books.

IN Action upon the Statute against the Defendant for Printing and publishing an Almanack, to their damage; Special Verdict find that the Usage of Printing hath been regulated by the King, &c. and that he by Patent granted them the sole Printing of Almanacks, and of the Common-Prayer Books, that the Defendant published the like Almanack with other Additions and Notes of Prognostication; they find 14 Car. 2. Cap. 33. §. 6. of Printing, and if for the Plaintiff, &c. and Judgment for the Plaintiff by the whole Court of C. B. viz. North Ch. Just. Windham, Atkins and Scrogs Justices: 1. That albeit Printing in England be but of late, yet publication of Books was before, and both before and since that hath been under the regulation of the Government. 2. The Patent for sole Printing this Almanack is no Monopoly, because though this be no Proclamation, or such Prerogative books, yet being always subject to the Kings Regulation, he may grant the sole Printing to whom he will, and upon this ground in Streater and Roper 24 Car. 2. a stronger Case than this, Judgment in B. R. was reverst in the House of Lords on the Grant of the sole Printing of all Law-books, yet that was lyable to interpretation what might be said a Law book, but in regard all belong'd to the Kings Regulation he might restrain them, and this was not like Trades that could only be regulated, not prohibited, and by 14 Car. 2. Cap. 33. §. 6. it is impliedly granted that the Printing of all Books is restrainable, or grantable by the Kings Patent, &c.

Earl of Shaftsbury. *Friday*, June 30.

(50) Imprisonment

DEfendant was Returned to be committed 16 Febr. 1676, by Order of the Lords Spiritual and Temporal during the Kings pleasure, and the pleasure of the House for certain high Contempts against this House: Williams excepted that the crime is uncertain, and also the place, and the time of his imprisonment, which in case of any other Court, Moor 899 pl. Aswicks Case, as in Star-Chamber and before the King and Council, where on such general Return the parties were discharged, 2 Inst. 52. 53. 55. & 1 Roll. 218. 219. and in Bushels

Case

Case, Vaughan 137. the Return was particular, yet not shewing the Evidence it self he was Bail'd, and whatever question comes Judicially hither, as Sir G. Bunions Case in C. B. in Bridgmans time, the Court ought to give Judgment; and it was held there that an Original might be filed against a Member of Parliament, and the Defendant pleaded priviledg of Parliament, Hill. 12 Ed. 4. Rot. in Exch. River and Costing by Bill there, which was examined sitting the Parliament, and held that a Member ought to have priviledg from Arrest, but not Dyer 60 pl. from Suit, 14 Ed. 3. Stantons Case cited in the Lord Clarendons Case on accusation by the Earl of Bristol, that Judgment in C. B. grounded on Order of the Lords in Parliament was reversed in B. R. by Error; and in the Lord Clarendons Case many misdemeanors arose out of the House, wherefore it was held they could not proceed; and Hob. 109. 111. they examine the very Journals of Parliament, Prin. Anim. 17. and what are Acts, and what not; and Hob. 29. Acts by the King and Lords, or against natural equity are declared by the Judges to be void, and here the commitment carrieth its own deaths wound, 1 Roll. 29. being against Law, and so ought to be declared void by this Court when Judicially before them, else there will be a failer of Justice, and what the Court may do after the Dissolution they may do now, and the Kings pleasure must be declared in this Court; also being not Returned that the Contempt was within the House, it shall be intended out; also had the Defendant been committed to foreign Prison of Jamaica during their pleasure, it had been doubtless illegal, and this Court being now seised of the Prisoner must answer for the second Commitment. 3. Were the Commitment intended until he be delivered by due course of Law this is the proper place to declare their pleasure, 2 Inst. 187. 118. Wallop on Vaughan 137. That Return must be as certain here as in the Court that committed, that the cause of Imprisonment may appear; for were commitment by the Lords not examinable here there needed be no cause at all shewed; and though they be a Superior, so that their Errors be not examinable here, yet they are a limited Jurisdiction, and if they exceed it this is examinable here, as if the King and Lords attaint J. S. 4 H. 7. 18. b this Court will restore him, and there is the same reason to discharge his Imprisonment; but by this incertain Return there can no Judgment be made; and if the Lords imprison A. that Arrested a Peer for Felony or Treason, this Court will discharge them; and where ever an Act as 1 H. 4. Cap. 14. limits the Power of either House, this Court are

Judges

Judges thereof as Expositors of all Laws; and because it cannot appear whither this Commitment were against the Statute, or not, its void; and so on 4 H. 8. Cap. 8. if a Peer were Arrested for speaking in Parliament this Court are Judges thereof, and the mischief of this Return is irremediable if the Lords as well as others do not set forth what they do by vertue of their power, and Postnati 19. such general Returns have in Parliament been held ill; & 3 Apr. 4 Car. 1. Resolved in Parliament, That no Freeman be committed by the Kings Privy Council, &c. but for particular cause, and if cause be required of the Privy Council who manage Secrets of State, much rather in the House of Lords, who are rather a Court of Law than of State; and 1667 the Lords refused to commit the Earl of Clarendon on general accusation without particular cause; Smith, that on 1 Roll. Abr. 59. this commitment being uncertain is illegal, and therefore against Magna Charta, and Petition of Right; and Hill. 12 Ed. 4. Rot. 4. 7. 10. was the foundation of the Judgment of C. B. in Sir G. Bunions Case, 20 Ed. 1. Reyly 93. Butler against Hopton in Wast ruled that it lay of Ancestors time; and 20 Ed. 1. pag. 57. its said to be a Statute, yet it was but an Ordinance, and never so practiced since, 39 Ed. 3. 14. & 1 H. 4. Cap. 13. was declared 14 July 1663, to extend to every accusation whatsoever, which must be on particular causes, and so then resolved on the Earl of Clarendons Case, 31 H. 6. Thorps Case; and if Imprisonment be illegal, this Court cannot remand; and it appears not whither this offence were by neglect or omission; also there is now no remedy, it being in the Kings brest to Adjorn the Parliament as long as he pleases; also Parliament Pr. 86. the Kings signing the Acts, 1 Car. 1. Cap. 7. makes a Sessions; and against this 16 & 17 Car. 1. Cap. it was cautioned that the Royal Assent should not determine the Sessions, 12 Car. 2. Cap. & 22 & 23 Car. 2. Cap. 1. Rot. Parl. 11 R. 2. 11. & Numb. 12. wherefore against 4 Inst. 27. which is not warranted by the Acts cited. Ayers 4. It doth not appear by the Warrant that the Defendant is commited by the Jurisdiction of the House of Lords, which is Coram Rege in Parliament, but by distinct body of the Lords, whereof the King is Superior, and may take notice of what they do, that Ministers of State accused or imprisoned may not be taken from him. Serjeant Maynard pro Rege, The main is that this is a Member of Parliament committed by the same Court, and not yet dissolved, and this answers all the Objections as to other strangers, for its yet under deliberation there what the contempt

tempt is, also in the Earl of Clarendons Case, it was not want of Jurisdiction that they did not proceed, and this Court is not to judg what is contempt or not, nor interpose in the Actions of Parliament while they are sitting, and so of Priviledges; also its but in Majorem cautelam, that its provided that Signing make no Session; also during the pleasure of the King and the House is not divisim, but his pleasure is to be adjudged in that Court that best know it; and here is no failer of Justice. Mr. Attorney Jones, That this Jurisdiction is exercised on one of their own Members, and as a Court of Judicature the Lords are Superior to this Court, because they redress the Errors of this Court; also this Court could not correct the Judgment of the Lords if the cause had been express, and had not been sufficient, also this Court cannot Judg of Parliamentary Priviledges or Proceedings; and there is great difference between Judgment of Incident Pleas of Priviledg in a Common Plea, and here, on sending for the party imprisoned by the Lords, who no more than the party committed by the Commons cannot be delivered here sitting the Parliament; also offences in Parliament cannot be punisht out, as the L. Hollis Case; and if offenders in that may be thus delivered out by this Court, there would be a greater failer of Justice by depriving of the means of Trial; for he cannot be tried here, therefore not Bailable here; but on Prorogation of Parliament it might be otherwise; also its not necessary that both the pleasure of the King and Lords do concur, but either is sufficient, and implied by Law, the King having power over such contempt, albeit not named, he may by pardon or by writ discharge them, and on Judgment of Imprisonment during the Kings pleasure, its left to the King himself, and is not in the Court. 2. The Sessions is not determined by signing Acts, Hutt. 61. but only by Prorogation or Dissolution. 3. Mr. Solicitor Winnington, The commitment of Mr. Selden was a commitment for contempts; and in Rushworths Collect. 18. was held good; and if Inferior Courts should Judg of their Commitments, the Jurisdiction would interfere, and this Court 2 Cr. 111. Judicially take notice of Adjournments and Prorogations; and in Soam and Barnardistons Case, agreed the Action lay not until the determination in Parliament; and in the Lord Hollis's Case the Judgment in this Court was reverst because this Court hath no Jurisdiction of what concerned the Parliament 2 Cr. 342. on Adjournments, the Parliament is sitting, and on Commission the Kings pleasure is by Privy Seal to discharge, or by the Great Seal to pardon and commit. Partridges Case, when

when the Parliament riseth signing makes the Sessions, but the signing makes none alone. 4. Serjeant Pemberton, That while the Parliament is adjourned this Court cannot determine whither it be a Sessions or not until the Parliament have determined whither it be so or not: And by Wild Justice, This is a strange question. Jones Justice, The Commitment is by Lords Spiritual and Temporal assembled in Parliament, and if it had been by an ordinary Court of Justice it had been void, but in this Supreme Court its well enough, and this Court cannot controul their Judgment against a Member of their own; and the Cases of Priviledges are not like to this being but incident, but this a direct Judgment on the proceeding of the Lords; and each Court allow the Customs of the other, which is the Law of the Court, and 4 Inst. 50. must be intended as Judged by themselves, so the cause is sufficient: 2. The Commitment is determined by the pleasure of the King by Privy Seal, or by the Lords, and the Sessions is continuing, so this Court cannot Bail nor discharge. Wild Justice, That this Court hath no Jurisdiction while there is any Sessions continuing, but if the Sessions were at an end they might discharge him. Rainsford Ch. Just. That this Court having no Jurisdiction of the cause cannot examine the matter of contempt, nor is it material what it is; & per Curiam he was remanded, there being no president of delivering a Member of Parliament by Habeas Corpus sitting the Parliament which would retard the proceedings of Parliament, and the Defendant was not surprised by sudden Adjournment not till May after; also this Order is an Execution, which continueth after the Sessions; and Jones said Twisden was of the same opinion.

(51) Books.

Dominus Rex and Marlo. Ante. *Saturday*, June 30.

ON Indictment of a second offence of Printing Unlicensed Pamphlet unde convictus est at Sessions in London, Error was assigned that Judgment was, That he be disabled to use the Trade of Printer, whereas the Statute of 14 Car. 2. Cap. 33. § 16. is to be disabled to be a Printer or Founder of Letters; Sed non allocatur, this being for the Defendants advantage, and the Statute is intended distributive, according to what Trade the Defendant is of. 2. The Statute is Fine, Imprisonment, or other Corporal punishment; and here the Judgment is of Fine and Corporal punishment, viz.

viz. Pillory; and the Court inclined it was Error. But Adjornatur.

Withers *and* Ent. Ante.

IN debt against the Defendant the Executor of Wall, Executor of Mason suggesting a Devastavit; against which Polyxphen excepted, That this lyeth not, because there is no Judgment averred against the Executor de bonis Testatoris; and the Case of Cory and Thyn, &c. was after such Judgment, and so were all the former Cases, and thus every one would begin with the Executor. Pemberton for the Plaintiff, That the waste is the main, and the Judgment but incident; but the Court inclined strongly that this is a new Case, and will oust all Pleas of plene administravit and pleading, and would try two Devastavits in one Original Action; and on nil debet he shall be charged of his own Goods on plene administravit, or non Devastavit, all the Judgments must be brought in Evidence, which is very difficult. Et adjornatur. (52) Executors.

Lock *against* Tertenants *of* Knight.

IN Scire Facias two Tenants pleaded Nontenure generally in abatement; to which the Plaintiff took Issue on 3 Cr. 872. Flood, and the Defendant demurred, because though this is no plea in it self, yet the Plaintiff hath admitted it; and per Curiam the Plaintiff may take Judgment and Execution, and may have Ejectment on Return thereof, but can remove no Tenant; and if the Defendant be not Tenant of the Freehold he may satisfie this Judgment, and so save his Term; but if he be Tenant of the Freehold, this Recovery is peremptory; but the parties agreed to wave the Demurrer, and take Judgment on the Return. (53) Execution.

Hickman *and* Snell. Ante.

ACtion upon the Statute of 23 Eliz. Cap. 1. §. for absence at Ninw. from Church without reasonable cause: To which the Defendant pleads he did not absent without reason- (54) Church.

able cause; to which the Plaintiff demurred, because the not going to the Parish Church is the offence which is laid in the City of Coventry, where the Defendant is an Inhabitant, which is a local offence, therefore should be laid in the County of the City of Coventry, and not in the County of Warwick. Wild Justice, The Defendant should shew what the cause is, and cannot plead his absence was for reasonable cause generally. 2. Its sufficient to say the Defendant went not to the Parish Church in the City nec alibi, and the saying sed voluntarie absentavit at N. in the County of Warwick is ill, the poor of that Parish where the offence is, being only intitled: Also on nil debet the Defendant may give evidence of going to Church at any other place; and Judgment for the Defendant; also its only quod cum non accessit to the Parish, nor any other Church, which is well enough.

Tapper *and* Davenant.

(55) Extinguishment.

IN Assumpsit Special Verdict find Obligation given for the same contract for a Coach and Horses during Infancy, and that the Defendant after time of the Obligation at full age assumed: And by Gurdler for the Plaintiff, the Obligation is void, 1 Roll. Abr. 73. and the first contract is now continued by Assumpsit at full age; sed Curia contra, the Obligation is only voidable, and extincts the contract, so the Assumpsit at full age is without consideration. And by Wild Justice, The Infant may plead non Assumpsit, and his Infancy is sufficient Evidence; and Judgment for the Defendant, Nisi.

Hall *and* Rougham. Ante.

(56) Merchants.

IN Assumpsit by the Plaintiff surviving joint Merchant, for money on joint sale of Goods to the Defendant; the Defendant pleads that the Plaintiff and J. S. were joint Merchants, and that J. S made B. Executor and died, 1 Inst. 182. F.N.B. 37. because Executors should be joined; to which the Plaintiff demurred, and the Court inclined that the Action doth survive, and that on recovery by the Plaintiff Executors shall come in, but cannot join; but the Defendant having pleaded in abatement, and the Demurrer being that the Plaintiff ought not to be precluded of Action, there must be a Repleader; and Judgment quod Breve cassetur.

Moxon

NOta, The 4th of August 1677, it was said that Hales late Chief Justice held at the Assizes at Bury, the last he went, that 27 H. 8. Cap. 20. §. 4. and 2. was of no force by reason of 37 H. 8. Cap. 17. §. and would not determin a case of Tythes thereon depending, and on 13 Car. 2. Cap. 12. §. 4. being very doubtful, See 32 H. 8. Cap. 7. §. 5. that none shall be compelled to pay Tythes, &c. for Lands, &c. discharged or not chargeable by the Laws and Statutes of the Realm, &c. (57) Trespass.

DE

DE
Termino Michaelis

29 *Car.* II. in *B. R.* Anno 1677.

Tuesday, Octob. 23.

Rainsford Ch. J. & *Wild.*
Twisden. & *Jones.*

Taylor *against* Baker.

(1) Bail.

HOLT on 3 Jac. Cap. 8. prayed Bail in Error of a Judgment, in debt on Judgment, this being all one as Judgment on Obligation in Scire facias, in which case, between Offly and Yarrow, it was held Bail ought to be: Wild Justice contra, this Statute extends not to Executor, nor to Judgments, but ought to be literally taken, especially the practice ever since having been not to put in Bail, and the Enumeration is only of debts of inferior nature; and in Hill and Drews Case, Hill. 15 & 16. Car. 1. on Plene Administravit pleaded by the Executor, and wasting found, it was held by Equity in debt on this Judgment, the Executor shall put in Bail; and though there were great reason it should be, yet Precedents being contra, the Court refused to set the Supersedeas aside.

Brown *and* Farmer. *Wednesday*, Octob. 24.

(2) Church.

CRofts prayed a Prohibition to the Bishop of Winchesters Court in Southwark, on Tax for repair of the Chapel of Bermondsey: The Plaintiff pleaded this was part of the Parish, which Plea not being put in on Oath was refused, whereupon

upon this being no cause matrimonial or testamentory a Prohibition was prayed on 2 Inst. which the Court granted, Nisi.

Laurens *and* Blyth.

(3) Heir.

SArjeant Pemberton prayed an appearance might be accepted in debt against Heir in the Sheriffs Court, removed hither on Habeas Corpus, and that he might not be forced to special Bail here, no more than an Executor because he is chargeable only for Assets, and the Court cannot presume he will not plead Riens per discent no more than Executors will plead ne unques Executor, and the Judgment must be only of the Assets; and the Bail cannot bring in the Body: nor can London or other inferior Jurisdiction inquire of Assets in Ireland, or out of the Jurisdiction: Et per Curiam, Common Bail was ordered, and the Special was discharged.

Dominus Rex and Nichols *and* Robins.

(4) Religion.

WIlliams excepted to Return of Commitment by Sir Thomas Allen, and C. Justices of the Peace, on 5 & 6 Ed. 6. Cap. 4. and 1 Mar. St. 2. Cap. 3. §. 4. for disturbance of the Parson licensed during his Office in Southmyns being too general, not shewing wherein they disturbed, by Brawling, Fighting, or otherwise; and there are several punishments of each, & per Curiam, this is a good exception. 2. It was ill to say per apertum factum but must shew the particular fact, as in Indictment, 25 Ed. 3. St. Cap. 4. and though this be a Judgment as Coles Case, Jones 170. pl. and Berryes Case, Roll. Abr. on the Statute of Partridges, 1 Jac. Cap. 27. and a Certiorari might be in nature of Error to reverse it, yet this Court may discharge on Habeas Corpus, and so they did, but the fact being putting on Hats after pulled off in the Church, they found Sureties of good behaviour for a year, &c.

Tod *and* ----------

(5) Account.

EX motione Saunders for new Tryal in account on Plene computavit, which the Plaintiff before this action pleaded, and Issue thereon. Wild Justice said it was reasonable, because here can be only Judgment quod computet, this being here a confession that he was once accountant. Contra per Twisden Justice, that this Issue is a confession of the account

and

and peremptory, and final Judgment shall be thereon. Sed Adjornatur, to see if notice or not.

Lot *and* Wade.

(6) Habeas Corpus.

EX motione Thomson for attachment against the Steward of Ashfield, for not Return of Habeas Corpus, which was delivered the day of the Tryal. And by Twisden Justice they cannot proceed after the Habeas Corpus delivered: Wild Justice contra, that if the Steward be Barrester above 3 Years he may proceed, and by 21 Jac. Cap. 23. he need not allow the Habeas Corpus, for the witness may dye before next Court day, which the rest agreed, and that its sufficient to return this, and an Attachment was denied.

Clappon *and* Edgcombe.

(7) Trades.

IN debt Qui tam upon 5 Eliz. Cap. 4. §. for making Hatts in Cornwall. Polyxphen excepted, 1. That the Plaintiff was dead, & per Curiam, the action abates as to the Plaintiffs interest, albeit the King may proceed for his. 2. This is debt brought here, which by Twisden Justice lieth well here on Barns and Hughs Case, because debt lieth not in Sessions below. But by Wild Justice on Nichols and Cotterells Case, the mischief is the same, and 21 Jac. Cap. 3. §. was made against verations suing of the party such small offences, and to this the Court inclined, being after Verdict for the King.

Boldroe *and* Moor.

(8) Presentations.

IT was said the King being by dissolution of Abbies, and founding of the Bishoprick of Ely, the Founder ordains by By-law, that as often as any Prebend of the Chapter become vacant by Cession, Surrender, death, or any other ways whatsoever, that the Bishop shall present, and Dr. Spencer being on death of the Dean made Dean by the King, the Bishop presented Dr. Boldroe. And Finch Lord Chancellor sent a Ne admittas to the Dean and Chapter, for Moor, supposing the Prebendary to be vacant by the Kings promotion of Spencer, and so this belongs to the King to present the Prebend, the By-law being intended of ordinary Cessions

Sessions, or otherwise vacant by act of the parties, not where vacancy is by the Kings act; as grant of all Fines extends not to Fines Royal, &c. and so it was conceived; but sub Judice lis est, and the Bishop did admit, &c.

The Corporation of Ironmongers *and* Naylor. Ante. *Thursday*, October 25.

(9) MR. Attorny Jones plaied treble Costs, on 14 Car. 2. Cap. 10. §. 14. and 16 Car. 2. Cap. 3. §. 3. because though the latter Act makes other Collectors, yet these are in pursuance of the former act, and so shall have Costs upon it; for this gives Costs to any persons that act by vertue of this Act, and not to the persons aforesaid only; and if the act give Costs to A. B. and C. Collectors, and after by another act adds others, these also shall have Costs, else the general Issue is taken away, these being all in one clause; & per Curiam, Judgment for the King. But by Twisden Justice, were it not all one clause the new Officers by the last act could not have Costs by the former.

Froud *and* Froud.

(10) Slander. RIchard Froud went to Deans House, and would have given him money to Rob Boulton, and he (Innuendo the Plaintiff) did with others Rob Boulton. Polyxphen excepted in arrest of Judgment, that the Robery must be intended by Dean, and not by the Plaintiff; and the Innuendo is idle, and cannot alter the words; which the Court agreed; and albeit the declaration be Dixit de, &c. and Verdict for the Plaintiff, yet Judgment staied. Post. 812. pl. 28.

Foy *and* Harder.

(11) Verdict. THe Court Ex motione Levins set aside Verdict in Northumberland, on Affidavit, that being divided in opinion they threw Clos and Pile, and ordred the Jury to appear in Easter Term next to an Information; this being by Wild cause to punish them, and as was said, broke Sir James Althams heart one of the Jury in the Case of Lord Fitzwater.

Win *and* Win. Ante.

(12) Fines. The Court reverst the Fine for want of the value of the Land, because thereby it cannot appear what should be paid for the Kings silver. 2. The Writ of Covenant is Teste after the Dedimus potestatem. &c.

Smith *and* Tracy. Ante.

(13) Ordinary. There is as much reason for distribution as for Administration. And by Wild Justice on the Duke of Suffolks Case, the half Blood is no Impediment as to Goods, which the Court agreed, and being in equal degree from the Father, they are as equal among themselves next of Kin Co. Ratclifs Case, and 22 & 23. Car. 2. Cap. 10. §. was intended that one should not run away with all; but Twisden doubted. Et adjornatur.

Friday, October 26.

(14) Lawyers. This day proceeded 13 Sarjeants, having appeared in Chancery, and were sworn the first day of this Term, viz. of Graies-Inn, Holt, Gregory, Weston, and Sir Robert Baldock, Readers, Raymond, and Stringer, Benchers; and of the Inner-Temple, Sir William Dalby and Holloway, Readers and Street and Symson: of Lincolns-Inn, Stroud Reader and Sir J. Shaw, of the Middle-Temple, Rawlins a Reader.

Allanby *and* Woolly.

(15) Distress. Action upon the Case, on 1 & 2 Ph. and Mar. Cap. 12. §. 2. it was excepted in arrest of Judgment, that an action on the Case lieth not, but debt for driving distress. 2. There is Costs 5 l. and treble damages, contra to 1 Roll. Abr. 574. North and Musgrave; the Court conceived this action being by Bill is well enough, but 1 Roll. 516. as to the later clause in debt there shall be Costs, but not in action upon the Case; but Adjornatur, for the party may release Costs.

Jennings

Jennings *and* Baker.

THat Declaration was ad Parliament. 29 October 28 Eliz. Inchoat. and continued and tent. per Prorog. usque ad, and in 23d of March following Anno. 29 Eliz. was alledged in arrest of Judgment as a misrecital in the action upon the Case, against the Sheriff for fees on 29 Eliz Cap. 4. and so the Court conceived. Et adjornatur. Supra See the Inder to Pult. Abridgment, its at the Session, &c. holden by Prorogation, 29th of October 28 Eliz. &c. (16) Parliament.

Dominus Rex and Sparrowhauke. *Saturday,* October 27.

BUgby excepted to Indictment, on 5 Eli. Cap. 4. §. for using of Trade, not being an Apprentice, the Caption being Juratores pro Domino Rege & Corpore Comitatus, &c. viz. A. B. &c. deliberaverunt Indictam. to the Justices huic scedulæ, of the Certiorari annexat. in hæc verba, Juratores, &c. presentant. not saying Juratores prædict. or qui quidem Juratores presentant. so it appears not by what Jury the Presentment was, which the Court agreed præter Wild, who held that the Indictment being well, the Caption may be intended the same, but it was quasht. (17) Trades.

Northcote *and* Maynard.

IN Action upon the Case without Scienter selling the Plaintiff Goods, that were one Staffords, with warranty: Saunders excepted in arrest of Judgment after Verdict for the Plaintiff that here is no Scienter, and so this action will not lie on the Warranty without some loss of his Goods; and this action being only on the Disceit there must be a Scienter, as 42 Ass. 8. but where there is a Warranty the Evidence would be of composition for, or taking away the Goods: Sed non allocatur, for per Curiam this action lieth on the Warranty without Scienter on averment that the Goods were another mans. 2. Its not averred that the Defendant was ever possest, but that the Defendant sold the Goods which were Staffords: sed non allocatur, for the falso & deceptive vendidit is sufficient unless the contrary appear. And Judgment for the Plaintiff. (18) Coron.

Alfed *and* Nevel.

(19) Rent. IN debt for Rent and several Nomine pœnæ, alledging demand on the Rent daies, and at the daies due. Girdler excepted in arrest of Judgment, that its said for Rent charge of 26 l. per Annum out of the Mannor of D. when it appears that the Grantor and Grantee had joyned in conveying away the Mannor, so it was a Rent seck, and no Rent charge: Sed non allocatur, for its good still by Estople, and this being but a recital of the Plaintiffs surrender of her Estate for life, and in consideration thereof this Rent was granted, which however is good as an Annuity; and demand at the Rent daies is sufficient without demand at the several daies of the Nomine pœnæ. And Judgment for the Plaintiff.

Mounger *and* Clare.

(20) Trades. IN Trespass the Defendant justified under the Mayor, &c. of Guilford to distrain for Penalty of By-law of 10 s. per month, on custom that none not born, nor Apprentice nor Admitted by Fine should exercise Trade there; averring the Plaintiff not born nor Apprentice there, nor Free; (not saying not admitted by Fine) to which the Plaintiff demurred. Et per Curiam, it should be averred he was not admitted. And Wild Justice said this By-law was ill, being against 5 Eliz. Cap. 4. §. but such a Custom might be good enough: And Judgment for the Plaintiff. Also Custom to set Fines and to have them may be good, but not to judge of them in suit before themselves, as Bringhams Case.

Plunket *and* Hodder *and* Tooke. *Monday*, October 29.

(21) Fees. ON 1 Cr. 159 and Owen 123. Gould excepted in Assumpsit to pay for Soliciting, that this was no good consideration, the Plaintiff being not said Attorny of any Court: Sed non allocatur, for in particular smaller matters any may Solicit, but in greater matters its maintenance. 2. There is Judgment by the Defendant against one, and Not Guilty pleaded, Verdict against the other, which per Curiam is well enough; but if one had not pleaded, Judgment could not be against the other if the promise were joynt. And Judgment for the Plaintiff.

Wise

Wise *and* Creech. Ante.

IN Prohibition on prescription that the Chapel of Bodicot in the Parish of Atterbury, hath distinct Rights and Perambulations and all things distinct, but only they of the Chapel buried in the Parish; and they of Bodicot have used to be discharged of Tares to repairs of the Parish Church; to which the Defendant demurred. Holt 1. because a general prescription to be discharged is not good for any number of men, all of Common right being obliged to repair the Church as much as the Highway, 5 Co. Jeoferies Case, Linwood 137. b 138. a its not by Canon but by Custom that they are discharged, and Noy 136. pl. one Occupier cannot oblige the Successor either to repair or to be discharged, Poph. 197. because this might charge some higher than due. 2. The cause of having a Chapel and their repairing thereof is not sufficient to discharge, for F. N. B. 50. B. and Register 54. the Inhabitants of Common right that have benefit by the Chapel, 2 Inst. 489. are bound to repair and not the rest, so Linwood 56. a and yet are liable to repair the Mother Church; and the chief reason of it is, because of decays by burials, 2 Inst. 489. and where a Capel hath burials they may be discharged of the repair of the Mother-Church, having no benefit by it, but are as meer strangers: Also 2 Inst. 363. the only tryal of Ecclesia & Capella, is by Baptisterium & Sepulturam, both make a Church, and wanting either its a Chapel; and though a man is not bound to repair two Parishes, yet he is in 1 Cr. 93. and 395. bound to repair the Chapel and Church; and in the Case of Toteridg there might be intended an ancient Union, so Hob. 66. the repairs continue as before, Noy 41. pl. and the person ought to have nothing for burial, no more than for Christning of Common right, but only by custom it being incident to their office so this is no cause to discharge the repair of the Mother Church, 2 Roll. Abr. 290. a certain sum of 3 s. 4 d. was paied to the Parish to lie in Bank for repairs, which was a good cause to be discharged of Tares. 3. Though the Custom be good, its of Ecclesiastical Conusance, and its not denyed, therefore on 13 Ed. 1. pag. de Circumspecte agatis a Consultation ought to be awarded F. N. B. 51. and 5 Co. 72. Williams's Case. Levins for the Plaintiff, The prescription is not to be discharged which is not good; but here is a sufficient cause alledged, that time out of mind they have used to repair their own Chapel, and not to sit in the Parish seats, which (22) Church.

which was setled in Palfry and Brown's Case, for this might be the orginal agreement on the foundations, so 2 Roll. 290. 5. and without the burial is held a good discharge, and if there be no such custom a Consultation may be awarded, but on denial of a custom the Spiritual Court shall not try it; so 13 Ed. 1. pag. on suit for a Modus or on plea of Prescription to repair an Isle in the Church; and in Brown and Palpheries Case, the plea was received as appeared by the Sentence in Spiritual Court it self, yet they could not try the custom. And by Wild Justice this is a good custom, & per Curiam a Prohibition is ex debito Justitiæ, and Hob. 66. is only that on the particular circumstances it was in discretion, not that its generally so. And Twisden absent, the Court advised to try the prescription first. Et adjornatur.

Beversham *and* Osborn. *Pa.* 27 Car. II. Ante. 800. pl. 62.

(23) IN debt for Rent, as to part, nil debet, there is Nolle prosequi, as to the rest there is a Tender pleaded without any demand or Obtulit; to which the Plaintiff demurred, because its not said the Defendant was ready at the place where the land lieth, and that the Plaintiff came not. Holt on 14 Ed. 4. 4. touts temps Prist is sufficient to put the Obligee to a request, for the Plaintiff cannot have damages and costs without; and Issue may be thereon, Rast. Entr. 154. in debt for a certain duty where damages are accessary, touts temps Prist, bringing in the money as here its pleaded, 1 Roll. Abr. 571. and 1 Inst. 32. and 16 Ed. 4. 16. Tender Br. 18. Hob. 8. the Plaintiff shall never have damages without demand of the Rent, this being pleaded before Imparlance; and all the Books 16 H. 7. 14. that say that the Rent is not paiable, Rast. Entr. 159. Co. Entr. 154. without demand, are not Law, unless this be a good plea; which the Court agreed, but for a penalty there must be a demand. But Wild inclined the Tenant ought to tender, Et adjornatur.

Bickerstaf *and* Pierce.

(24) Executor. DEbt against the Defendant by the Plaintiff and his Wife as Executor of one Clerke, on Judgment for damages and costs, alledging that the said Jane had after the Judgment married quidam Johan Bickerstaf without day or place: The Defendant after Imparlance pleads ne unque accouple in abatement; to which the Plaintiff demurred, and now

now Mr. Attorny Jones on Dyer 90. pl. said that Quidam must be intended a Stranger, and so the Plaintiff not well entitled, which the Court agreed, and rather because Baron and Feme pleaded it; and the plea was agreed ill, the marriage being traversable, and the Plaintiff had leave to discontinue.

---------- *against* Sheerlocke, *&c. Tuesday*, October 30. *Wednesday*. October 31.

(25) Covenant.

IN Covenant on Lease by Parson, and A. and B. Church Wardens of St. Dunstans, that they nor their Assigns or any claiming by or under them should not Build, &c. upon the Lands let; breach assigned in building a House of Office by Day and Peachman then Church-wardens continuing it divers Years, and on Judgment by Default, and damages intire, Polyxphen excepted, that albeit they were Church-wardens at building, they could not be so for divers Years, but the Lease being Sheerlock Rector, and by A. and B. Church-wardens not alledging custom to Lease as Corporation, they shall not be intended a Corporation: Also its said Post Confect. Script. which was in October viz. 1st January they &c. erected, which per Curiam is ill; not averring they were Church-wardens at the time of the Lease. And Judgment staied.

Catesby *and* Emans.

(26) Tryals.

EX motione Levins to set aside new Tryal after Nonsuit at Guildhall, on Affidavit of surprise on agreement to try in the afternoon, and the case in the morning being the last Cause; sed non allocatur, for the Court may as well grant new tryal on Nonsuit as after Verdict, and it was granted per Curiam, for the Plaintiff paying Costs.

The City of London *and* Clerk Ante.

(27) Salnder.

EX motione Mr. Recorder Dalbyn for a Procedendo on Certiorari of suit there against the Defendant for words spoken of Alderman Lawrens, having shewed three Precedents for it; sed per Curiam a Procedendo was denyed, such a custom to be judge in his own case being void, though confirmed by Parliament, and the Precedents in the time of Ed. 1. of Alderman

berman Tate was but for divers scandalous words generally, and only a Fine, and was granted in Chancery, and not on Certiorari here; and the other in 38 Eliz. was not on custom to disfranchise as this is, but was words spoken against the Governors of Christs Hospital, whereof some were Aldermen, and were put in only to agravate damages; & per Curiam a custom to disfranchise for words is void, and a Procedendo was denyed.

Proud *and* Proud. Ante. 805. pl. 10.

(28) Slander.

ON Moor. 419. pl. and 710. pl and Leonard 101. 3 Cr. 291. & 6 Judgment was prayed in action upon the Case, saying of the Plaintiff that he went to Deans house, and would have given money to Rob J. S. being actionable without the latter words, for that he would &c. cannot be known but by some instance or perswasion; the Court agreed that to say A. went to B. to give him money to Rob, and B. did Rob, is actionable: So Rainsford Chief Justice and Jones agreed here, but Twisden contra: Wild doubtful, Adjornatur.

Dominus Rex and Carye. Ante. *Tuesday*, November 6.

(29) Imprisonment.

HE was Committed the 24th of October, for the citing the Dutch Ambassador as a Criminal before the Counsel by color of an Order of Counsel, and printing it where there was none. Mr. Attorny Jones opposed his Bailing, being not within 17 Car. 1. Cap. 10. §. 5. which was intended of arrest by Order of Counsel for matters of ordinary Justice, not of this case that Relates to foreign Treaties, and our League with the Dutch who had demanded satisfaction; and there is no suitable remedy by Indictment, no more than on an arrest of an Ambassador; and it will not be possible to secure Treaties but by such an imprisonment, during the pleasure of the Counsel; which by this Court must for a contempt be intended but for a reasonable time, 1 Cr. Chambers's Case, there was no particular cause appeared, but if it had, and the Counsel had Jurisdiction he had been remanded. Williams for the Defendant, the offence is at most but Trespass, so is doubtless Bailable, and there is no difference between offences against the Kingdom and the Law, and had he forged an Order of Counsel or assaulted the Ambassador it were

were ſtill Bailable, and here is no offence in Counſel, as Chambers Caſe was, which was ſtronger than this, yet Bailed, and the not bailing him on Habeas Corpus for his Fine in the Star Chamber occaſioned the Statute of 17 Car. 1. Cap. 10. which is but declaratory of the Common-Law; but per Curiam, this is a great contempt, yet not puniſhable here but by the Rules of Government, and therefore he is not to be delivered until he hath ſatisfied by Impriſonment or Submiſſion; and by conſent Adjornatur, to make Submiſſion to the Counſel and to the Ambaſſador.

Betts *and* Gale.

(21) Officer.

ERror of Judgment in C. B. on demurrer in debt on Obligation to pay forty pound per Annum, ſo long as he ſhall have and exerciſe the Office of Regiſter of the Archdeacon of Chicheſter. Polyxphen aſſigned that this is void, on 5 & 6 Ed. 6. Cap. 16. But by Wild Juſtice, the Statute being not pleaded, this is no more than Obligation by the Judge ſo long as he ſhall be Judge, which is not within the Statute; which the Court agreed, but if it had been to pay, &c. for the Office, it were void. And Judgment affirmed.

Maſon *and the Biſhop of* Hereford.

(12) Ordinary.

TRemayn plaid a Prohibition to Hereford, on Oath to preſent Articles in a Printed Book, which the Court granted on Sands and Peck to London, and another to Dr. Wiſeman. Ex motione Symſon, whereupon the Oath in London was regulated and made well and truly to execute the Office of Church-warden; and ſo a Prohibition was to Buckingham. Ex motione Coleman. Poſt. 826. pl. 51.

Ante.

(22) Parliament.

IN action for fees. Levins plaied Judgment on declaration ad Parliament. 29 October 28 Eliz. begun and continued, by Prorogation until March 23, and then Diſſolved 29 Eliz. which 4 Inſt. 7. takes notice of as a miſtake: But the Parliament was Prorogued from the 29th of October to the 15th of February, 29. and then continued to the 23d of March 29. without holding 29th of October, but it was after held the 15th of February by Prorogation; the firſt continuance is the Roll of the Houſe of Lords, but at the Rolls it is Tent.

28 Eliz. by Prorogation, to the 15 of February, both which are true, but there being no Oath of the Certificate that it was a true Copy, Adjornatur.

Morris *and* Wilford *Executors of* Sterling.
Wednesday, November 7.

(33) Covenant. IN Covenant to save the Plaintiff harmless of personal Estate in trust for the Wife of the Testator, and breach assigned in suit by the Testator and his Wife, and putting the Plaintiffs to charge; The Defendant pleads Relase to the Defendant by the Lord Grandison, who married the Widow of Sterling, and the Plaintiff of all demands and all rights in Brewing Vessels, and in the personal Estate of Sterling vel aliter; To which the Plaintiff demurred, on 25 Ass. 7. because this Release is particular, and a Release of all demands Bars not remedy for a Covenant broken, albeit there be no other remedy but against the personal Estate, yet the Estate is not affected until Recovery, and the breach was in the Testators lifetime until recovered; which the Court agreed. And by Wild Justice a Release of all demands to the Executor will not discharge breach of Covenant or damages recoverable against the Executor: and by Jones Justice notwithstanding Release of all the Plaintiffs right in the Brewing Vessels to the Executor, yet may they be taken in Execution for damages after recovered on breach of Covenant before; 1 Inst. 265. and 5 Co. 2. Hoes Case, Lit. Sect. 495. so after cause of action by Battery, release of all demands in personal Estate is no Bar. But Rainsford Chief Justice doubted. Et adjornatur.

Dutton *and* Pole. Ante.

(34) Assumpsit. ASsumpsit to the Father of the Plaintiff, possest of Trees and intending to sell them for Childrens Portions, whereof the Plaintiff was one, and in consideration he would forbear, the Defendant promised to pay the Plaintiff. And by Williams the action, as Moor 550. pl. Lever and Hayes, is well brought by the daughter; so Sprat and Agar, Stiles; so Yelverton Rippon and Nortons Case, and Yelverton 24. 1 Roll. 31. and Stilles 296. Starke and Milney, and if the Son Defendant had promised to the Plaintiff on sail of the Trees by the Father to the Son, the action would lie, and there is as

as much reason here where the Son is to have the benefit by the Fathers not cutting the Trees, and either the Father or the daughter may have the action. Hill. 23 & 24 Car. 2. Rot. 1538. Norwich and Pine contra, Assumpsit by the Son to the Father on consideration of the Fathers Surrender, to pay to the Daughter, and adjudged in C. B. that the Daughter could not bring the action. And so Jones Justice agreed, that where the Plaintiff hath any merit in the consideration, it may be brought by him or the party to whom the Assumpsit was, as in Levet and Hawes Case, but here is no merit in the Plaintiff. Wild Justice contra, a Portion is due Jure naturæ, wherefore these Trees being designed for that purpose, the Plaintiff may have action. So 3 Cr. 163. Rockwoods Case, and 1 Leonard 192. Which Rainsford Chief Justice agreed; but by Jones, the Father might have releast this promise to the Son, and notwithstanding the death of the Defendant since the first day of the Term; Yet Judgment for the Plaintiff, Nisi.

Davice *and* Price. Ante.

(18) Trover.

TRover de 10 Juvencis Angl. Bullocks and Heyfers, not saying how many of each, which per Curiam is ill, as pro 12 equeis Mares shall not be recovered, and Lapton and Stanton, Hill. 24 Car. 1. Rot. 462. Trover pro 20 Ovibus matricibus, & Agnis, held void after Verdict, not distinguishing how many of each; This being in Replevin, which was more reasonably excepted in, because of the Return: And after Judgment by default and Writ of Enquiry of 120 l. damages, this was assigned for Error; and Judgment Reverst, Nisi the parties agreed to accept a plea, and try de novo.

Payn *against the Bishop of* Bristow.

(17) Ordinary.

PAulet plaied Prohibition upon 13 Car. 2. Cap. 12. §. 4. on Charging the Plaintiff brought in as a Witness to swear whether he heard one Weeks Preach, who was libelled against for holding a Conventicle, because hereby they should accuse themselves: And to this Wild Justice agreed; but per Curiam by this means there would be no Witnesses; and the Plaintiff might hear him Preach without being guilty of the offence; but per Curiam, a Prohibition may as to any questions whereby the Plaintiff may accuse himself, grantable, on suggesting their refusal of that answer, non tenetur respondere.

Hemingway *and* Sad. *Trin.* 29 Car. II. *Rot.* 578.

(37) Tail. IN Covenant by lessee of Tenant in tail, not warranted by the Statute (on assignment to the Plaintiff) that he was possessed of the Indenture, and that then it was unavoided and unavoidable; then the Tenant in tail dieth, and breach assigned that the Issue entred, and demurrer thereon; and the Court inclined this was no breach, unless it had been that it should so continue during the Term, or that the Assignee should enjoy it during the Term, for the Lease is only voidable on the Contingent of the death of the Tenant in tail. 2. The Fine was only Recognoverunt & Concesserunt; which by Jones on the Satute are the operative words, and the Quietum Clamarunt de se & hæredibus is only in Fines on a Release at least; This is a good Fine until Reverst by Error, which the Court agreed.

Dominus Rex and Plumb. *Thursday,* November 8.

(38) Marketovert. MR. Recorder Dalby praied the Defendant might plead, and the Indictment of Fruterer is a Trade within 5 Eliz. Cap. 4. §. being an ancient Company in London, and in 2 & 3 Ed. 6. Cap. 15. of Engrossers, Fruterers are mentioned, and they carry Fruit to the Straits, which none without service can so preserve; which the Court agreed, albeit Apples be no Victuals, within 2 & 3 Ed. 6. Cap. 15. yet Fruterers is a Trade within 5 Eliz. Cap. 4. Twisden said that others may buy and sell Fruit as well as Fruterers, and the Court refused to quash it, but left Polyxphen for the Defendant to plead or demur.

Smatle *and* Schollar. *Hill.* 28 & 29 Car. II. *Rot.* 767.

(39) Devise. ON Special Verdict in Ejectment on the Will of Richard Opie, I give unto William Opie my Nephew all my Land to return to him after the death of me and my Wife. And William being not Heir, Tremayn held, on Moor 7. pl. and 13 H. 7. Devise Br. and 3 Cr. 15. Moor. 123. pl.

that

in the Indenture, albeit neither in the Covenant, nor in the Fine, yet the Estates being displaced by the Fine Sir Peter is not in after death of Thomas by the Deed, 39 Eliz. but by the uses of the Fine, being estopt by the Indenture to claim any other Estate, as Trin. 4 Ed. 2. Oblig. 16. and Sir Rich. the Defendant being born after the Fine, though in the life of Peter, it cannot reduce this right to an Estate; so Wig and Villar, 2 Roll. Abr. 797. §. 12, 13, 14. but the Heir or Feoffees by 39 Eliz. must enter to reduce the Estate. Polyxphen for the Defendant, That Peters Sealing is no Estople nor Conveyance of any Estate, there being no agreement by all parties to the Deed, nor any where said that Peter was to convey, and his bare assent by Deed can pass nothing. 2. This Deed can be no Estople as to Peter, for Estoples (Estople 252. & 1 Inst. 352.) must be expressed and certain, and not by inference as this should be, for Peter is no party to the Fine, so cannot be estopt by that; also if there be an Estople yet Estrangers are not estopt thereby: 1 Inst. 185. & Eopl. Br. 15. if one joint Tenant accepts Lease, it severs not the Jointure, nor alters the Estate. 3. The Fine by Thomas 12 Jac. though it do divest, yet on Lloyd and Brookings Case, it leaves a right in John sufficient to preserve his Issue; so 2 Roll. Abr. 795. of Contingency. 4. Here can be no entry by the Covenantee, but the parties in interest in Remainder may enter on disturbance, as 8 Co. Whitlocks Case, else if the Feoffees must enter all Settlements to uses would be shaken. 5. On the settlement 12 Jac. there is a limitation to John whose Issue is yet alive, and the Defendant which sheweth the Plaintiff hath no title, so no matter whither there were any entry by the Defendant or not, which the Court agreed, and the Defendant having prior possession, Judgment for the Defendant.

Brown *and* Farmor. *Saturday*, Nov. 10. Ante.

SErj. Baldwin opposed Prohibition to St. Magd. Bermondsey on Tax to repair the Church, suggesting none ought to swear in Ecclesiastical Court but in Matrimony and Testament, and that they refused this plea, because the course of that Court is to receive no Allegation but on Oath. Mr. Attorny Jones contra, That this matter of repair is not secret as the others are, Regist. 36. b F. N. B. & 13 Car. 2. Cap. 12. §. 4. hath influence on this matter though not Criminal; and in Cases of Legacy if the Defendant allegg payment they admit that without Oath; & per Curiam, all things to stay until it be determined whither they on 12 Co. 27. may compell answer (42) Church.

on

on Oath or not. But by Jones Justice 2 Inst. 657. is only of Juramentum Calumniæ, which is only of the truth and falshood of the Libel or Plea, not de Juramento generally; but adjornatur, for their usage may expound but cannot alter a positive Law.

Hemingway *and* Sad. Ante. *Monday*, Nov. 12.

(43) Covenant. Raynsford Ch. Just. delivered the opinion of the Court, That the latter words of the Covenant extends only against the Plaintiffs own acts; and Judgment for the Plaintiff.

Saunders *and* Williams.

(44) Common. IN Action upon the Case for disturbance of Common; the Plaintiff declared on seisin of one Acre in fee, and another for years, and that he had Common for all Cattle levant & couchant upon both Acres; the Defendant justified for Common also, and it was found not to have Common; and on 6 Co. 50. b Gatewayes Case, it was excepted in Arrest of Judgment, that the Plaintiff hath made no title; which by Polyxphen for the Plaintiff, is needless, being grounded on the possession only; and so St. John and Moody, 1 Cr. 325. 429. 475. in Action upon the Case for stopping a Way or a Watercourse, and of lights, there needs no title, the cause hereof being the damages only, and the title is Collateral. Wild Justice said, The difference was between trespass where title is needless, and Action upon the Case where it should be; But per Curiam Judgment for the Plaintiff, title being requisite in neither.

Hartpool *and* Kent. Ante. *Tuesday*, Nov. 13.

(55) Attainder. WIld excepted that the record is not yet removed, but is still in C. B. in Ireland, the Writ of Error being of a Record of a Judgment before Booth that was before Smith; and by Raynsford Ch. Just. this is a strong Case for the Defendant in the Writ of Error, the Nocency of the Grandfather doth not bar the contingency that happened after the death of the Father by the birth of the Grandson, and notwithstanding the Fathers Estate was forfeited by his Nocency, yet being not attainted the Fee in the Grandson could not be forfeited. And by Twisden, There being no Record removed into B. R. in Ireland, the Judgment of Affirmation there must be

be reverſed here for Error; but per Curiam its never removed into B.R. in Ireland, therefore never came hither: And by ſpecial Rule notice was ſent to C.B. in Ireland to proceed to Execution.

Robinſon *and* Woolly. Ante.

SPecial Verdict in Ejectment on Leaſe of Stansby preſented by Guiſe to the Archbiſhop Guardian of the Spiritualties, who gave Mandate to the Archdeacon to Induct, and before Induction had, a new Biſhop is made. And Holt for the Plaintiff, That this Induction by vertue of the firſt Mandate is good, this being but a bare authority, which the Biſhop 11 H. 4. 9. b cannot give but only Inſtitution, & Pl. Comm. 529. the Archdeacon is appointed by Law to give Induction. 2. This is a temporal Act, Hob. 15. Its true a Baily cannot execute authority of old after new Sheriff, but the Archdeacon is an Original Officer, and the perſon that doth Induct only by authority from him, and if there be no Archdeacon, there can be no Induction; and if the Archdeacon could not Induct virtute Officii but only by vertue of the Mandate of the Guardian of the Spiritualties: Yet 2. the authority being in part executed it ſhall proceed for the reſt, as in 2 Cr. 73. Ayer & Adem a vend. exponas to old Sheriff good after a new one, and 1 Cr. 93. the Executor ſhall be ſued for a Legacy, where the Prerogative Court are poſſeſt of the Will, ſo 2 Cr. 483. ſo the Guardian of the Spiritualties being once poſſeſt ſhall proceed. 3. This Induction is but an Execution, and 34 Aſſ. 8. Comm. Br. 13. ſhall proceed notwithſtanding a new Commiſſioner, and thus at Newgate in Eaſter Seſſions Priſoners are Executed notwithſtanding B. R. ſitting before; but per Curiam this is by 1 Ed. 6. Cap. 7. §. 5. Moor 107. Pl. Knowls and Noy 135 Pl. Deans Caſe, the Law is not preciſe in theſe formalities to make a nullity. Wild Juſtice, That the Archdeacon is but the Biſhops ſervant, as Hare and Bicklyes Caſe, Pl. Com. and temporal poſſeſſion is given by Induction, before which he can have no Tythes, nor hath but jus in re, 34 H. 6. not ad rem, which the Court agreed; and in caſe Goods remain for default of buyers, a Diſtringas ſhall go to the old Sheriff to deliver over the Goods to the new Sheriff, and after a vend. expon. to the new Sheriff to ſell, Moor 747 & 1 Roll. tit. Execution. Saunders for the Defendant, That this is but a bare authority, and executed in no part untill the See is full, therefore is not like thoſe Caſes at Common Law; for in every Caſe the Biſhops make a particular Mandate, and in caſes of neceſſity, as on the death of the

(46) Encumbent.

Archdeacon the Bishop may make a Mandate to others, and so he hath done in this case to those that had the Mandate of the Archdeacon, and otherwise there can be no bounds set to the Archdeacons authority, but it may be executed at any time never so many years after; and its clear the Execution of the first authority without notice of its repeal by the latter is an excuse in trespass. Twisden Justice, The Archdeacon hath time during life to Induct until request, and no Action upon the Case until request, and things that pass no interest, and are Executory, as Livery and Seisin, are all repealed by death; for the Execution must be by vertue of Mandate only, as the Sheriff by Writ, which is determined by Demise le Roy, which the Court agreed, and Judgment for the Defendant by all the Court, 1 Cr. Crew and Vernon Reversed.

Lane *and* Vane.

(47) Fines.

EJectment on Demise of Cook and Cary, Special Verdict find Forth seised, and by Lease and Release on Marriage with the Daughter of the Defendant, conveyed to the Defendant and I. I. to the use of Forth for ninety nine years if he so long lived, Remainder to the Trustees for life of Forth, Remainder to Albina Vane Wife of Forth for life, Remainder to the use of the first Son of the Wife, &c. Remainder to the Issue male of Forths body, Remainder in Fee to the Wife, and after they Mortgage by Lease to the Plaintiffs Lessors, and thereupon levy a Fine to them to the use of Forth in Fee, at which time there was no Son; the Trustees enter, and after a Son is born, Holt for the Plaintiff the Husband being dead the Lessors of the Plaintiff, the Conusees of the Fine shall enjoy it during the life of the Wife, because her Estate is not extinct nor forfeited, nor merged by the Fine on Co. Bredons Case, and Co. Treports. Case, where Tenant for life and he in Reversion join, its no forfeit, else it must inevitably have been a discontinuance, so Hob. 277. the Estate for life could not pass as involved in the Inheritance. 2. Also this can be no forfeiture for the sake of the contingent Reversion by matter Ex post facto, being no forfeiture on the Original conveyance, 2 Roll. Abr. 119. tit. Maerism, the Law takes no regard to Contingencies until they happen. 3. Though the Estate could never revive nor exist separate from the Inheritance, 1 Inst. 276. yet the Conusees shall enjoy it vertually, as on Release by Tenant for life to Disseisor, so Hob. 278. where Tenant in Tail Infeoffs I. S. and the Reversion for life releaseth to the Feoffee I. S. he shall enjoy it, 1 Roll. 855. tit. Estates,

Estates, though Tenant in Tail die without Issue, for there is no way to destroy the Reversion for life but by forfeiture or extinguishment, 11 Co 80. Lewis Bowls Case, the Estates may be divided by Act in Law, or may be preserved without Interposition, as 1 Co. Archers Case, and its sufficient it vest in point of right, and its sufficient that Reversion vest when it falls thus on supposition the Fee were in a stranger. 2. But in this case the Wife was seised in Fee, which is only divided by the hapning of the Contingency, which was a Remainder after the life of the Wife, which is transfer'd in the same manner she had it, and the Fine sur Conusans de Droit come ceo hurts no more than Bargain and Sale, or Lease and Release, or Grant of Reversion by them, 1 Inst. 30. a the Feoffee shall enjoy during life of the Husband seised Jure uxoris in Fee. Trynder for the Defendant, That the Fine by Forth and Uxor is a forfeiture, but at least an extinguishment of the Wives Estate, which was at this time not for life but in Fee executed, as 11 Co. 80. is resolved until the contingent happen, so 1 Cr. Borton and Nichols, and had it been a Bargain and Sale, or Lease and Release, nothing would have passed, but the contingent might rise notwithstanding, but a Fine or Recovery destroys all contingent Interests, 4 Co. 65. Fullwoods Case, and 1 Leon. 92 pl. Hamingtons Case, though not grantable over, and so here, and the like of Rights to Aud. Quer. Error, &c. which are not transferrable, and since 27 H. 8. Cap. 10. §. contingent uses to persons uncertain are destroyed, as 1 Co. 174. Digs Case by Feoffment, Moor 554. pl. Powel and Vere, and in Chancery, Coram Hales, Wild, Windam, and Ellis Justices, in Febr. 1672. Rich. Lower conveyed to the use of himself for life, Reversion to Tho. Lower if he over-lived Philadelphia, and resolved that against the Fine levied by Thomas Lower he should not take Remainder, albeit he survived Philadelphia, who had no Estate, and so upon 1 Cr. 358. pl. 9. the Earl of Kent, the Wife cannot take against her own Fine, and if the Estate be never in her, it can never pass to the Conusees Lessors of the Plaintiff to her use; but if her Estate had been in esse, as in Co. Treports Ca. & 1 Co. 77. Bredons Case, the Conusees should have enjoyed it; and 1 Inst. 30. differs from this Case, the Law looking on the Tenant by courtesie as an Inchoate title, and the Lord shall thereby avow upon him as Tenant, so is in existence, but here it must be intended to rise by way of use, and not by splitting the Estates, but as of the said proviso If she hath Issue she shall hold for life. In Pibus and Mitfords Case the Ancestor was

Tenant for life. Twisden Justice, That this is a forfeiture of her Estate for life, as if Tenant for life, Remainder for life, Remainder in Fee, the Tenant for life levies a Fine, this is a forfeiture for his life. And in Lord Cooks Settlement on his Lease for years to one that had notice of the contingent Remainder and Feoffment after was a reviver of the Contingencies. Wild Justice, That the Estate Tail in Forth ariseth out of the old Estate, and then the Entry of the Feoffees preserveth all Contingents, and Stiles 192. pl. 438. in Garrard and Blizards Case there was a Reversion in esse, and therefore adjudged a forfeiture, to prevent fractions, but here is no Remainder in esse, by Jones Justice at the time of the Fine levied, and 1 Co. 76. Bredons Case was adjudged on the reason that the Rent had continuance whither there were a forfeiture or not; and by Wild Justice, if she have the Fee the Conusees cannot enjoy it during life, and if it be but for life, its a forfeiture. Et adjornatur.

Fortescue *and* Abbot. Ante.

(48) Devise.

SErjeant Maynard for the Plaintiff on Devise of part to his Wife, and of other part to the other Children, and when either Child die, what is given to them shall be equally to be divided among those that survive, having four Children, John the Eldest dieth, and whither Lessor of the Plaintiff shall as one have a third part of his Estate was the question, she being Daughter, and this being no contingent Estate but must be taken as distinct Devises future, and Estates in Common to all, 2 Cr. 260. and Co. Borastons Case, where the limitation is upon a certainty its no contingent Estate as here on death of John which is certain, and though it be a contingent how many shall survive, yet their Estate is not contingent, as 3 Cr. 454. Wellock and Hammond, paying, though naturally a condition, may be a limitation to preserve Reversion. So 3 Cr. 418. 2 Cr. 590. and the Devise is not by way of Remainder, for to all the Children but John, the Devise is of all his Interest, which is a Fee, but to John is general without mention of what Estate, so he hath for life, but by construction, and the clause after, That if either die, &c. as Dyer 357. is only by way of future Devise, and must be thus expounded to make the Will good. Saunders for the Defendant, on Moor 279. pl. excepted it was not averred Socage, which per Curiam, is needless in Special Verdict, contra in a plea, also Wood and Ingersole, this may be a contingent Reversion notwithstanding the devise be general of all his Estate

Eſtate to ſome of them, for this is but a deviſe by Implication, and ſo ſhall not be made an Executory deviſe, where there may be a Reverſion, and unleſs this be by way of Reverſion it would be an Executory deviſe as to the Heir, and a contingent Reverſion as to the reſt, and its plain the Deviſor did intend all to go one way, and to this the Court inclined. But Adjornatur.

Ent *and* Wither. *Friday*, Nov. 16. Ante.

(49) Executors.

DEbt againſt the Executor in debet & detinet on Obligation of the Teſtator ſuggeſting a Devaſtavit, the Defendant pleads ſeveral Judgments ultra quod, &c. the Plaintiff replieth, they were kept on foot by fraud, &c. the Defendant demurred. Saunders, there is no difference between a Judgment and a Bond, for nil debet is a good plea to both, and its the tort that gives this Action, and here muſt be Evidence by an actual waſting, and therefore it differs not from the Caſe late in the Guild-Hall before Hale Chief Juſtice, which fell for want of proof, but no exception to the giſt of the Action; nor by Wild Juſtice, was there any opinion the Action lay, and on nil debet the Iſſue muſt be tried, but this hath gone far enough already, and will be the way to ouſt all Scire Facias and Enquiries. And by Jones this would put great hardſhips on the Executor, as if he have Releaſe, &c. becauſe he can plead nothing but nil debet; which Raynsford Chief Juſtice agreed, and Judgment for the Defendant; but after Serjeant Pemberton for the Plaintiff had leave to diſcontinue.

Marwood *pro Domino Rege and* Stoop. Ante.

(50) Coron.

EX motione Mr. Attorney Jones for a Melius Inquirendum of Felo de ſe, the Original on the Return of the ſeveral Certioraries by the Coroner at the Suit of the Lords and others, &c. being that Draper, &c. was mad fourteen days before he killed himſelf; the Court agreed on 8 H. 5. 8. & 22. Aſſ. 31. that a new Enqueſt may go into any County. And the form may be amended by the Coroner before Sealing, as Quia, &c. for Qui, &c. Dicunt; but by Raynsford Chief Juſtice, taking the Verdict of the Jurors apart, albeit all ſealed its ill, eſpecially this ſealed being different from the Notes; but by Wild and Jones its well enough, and ſo is the general practice on Writs of Enquiry, &c. and by Wild Juſtice, the Kings Attorney may traverſe this Enqueſt as well as the

the party, and for the same reasons the Court would not quash it. But Adjornatur.

Mason *against* Robinson *and* Baldwin. Ante. 813 pl. 22.

(51) Ordinary.

SErjeant Baldwin opposed Prohibition to the Bishop of Hereford on suggestion that by the Laws no person ought to be cited to take an Oath in any Causes but Matrimonial and Testamentary; and that by 13 Car. 2. Cap. §. 4. no man ought to answer on Oath to accuse himself, and that the Defendant had exhibited an Oath to present the Articles in charge in a Printed Book, among which was one, If any on Sundays labour, or suffer Servants to play or Game; and for refusal of this Oath the Plaintiff was Excommunicated; whereupon he appealed to the Arches, and notwithstanding Inhibition the inferior Court proceeds to carry back the Cause, and thereupon prayed a Prohibition; which by Baldwin ought not to go, for this Book of Articles was not exhibited, but another prescribed by this Court, and Sir Robert Wiseman for the Commons on debate, which was communicated to all Inferior Chancellors, viz. To execute the Office of Churchwarden, and according to the best of your skill and knowledg, and shall according to your knowledg present all things and persons as by your knowledg are presentable by the Ecclesiastick Laws of the Land. The Court conceived it a hard Oath well to execute the Office of Churchwarden; but should be according to my knowledg to execute that Office; and so putting out the clause (and) they agreed to take the Oath, which was agreed to.

Ayers *and* Withers.

(52) Fees.

IN Indebitatus by an Attorney for Money laid out, and Fees; the Defendant pleads non Assumpsit infra 6 Annos; the Plaintiff replieth that such a day he sued an Attachment of Priviledg, and continued it, and that the Defendant assumed infra 6 Annos before the first Attachment; the Defendant rejoins that the Plaintiff gave him no Bill; to which the Plaintiff demurred, and it was now said to be a departure; which Jones Justice agreed, because the want of a Bill might be pleaded at first in Bar; also it may be given in Evidence by 3 Jac. Cap. 7. on non Assumpsit. Wild Justice contra, that this Replication is in nature of a new Assignment; to which the Defendant may have a new Answer, and the want of a Bill is no Evidence on non Assumpsit no more than the Statute

Statute of Limitation, 21 Jac. Cap. 16. that cause of Action was above six years: But adjornatur. And after Serjeant Pemberton had leave to discontinue.

Carter *and* Fuller.

IN Indebitatus in Inferior Court of New Windsor, after Verdict Error was was assigned in want of continuance; which by Wild Justice is not Error, the Statute of 32 H. 8. Cap. 30. of Jeoffayls, extending to Inferior Courts, and so resolved in Parliament in the Case of Cole and Forth, Error out of London in wast, but this being only a Judgment by the Defendant, and not after Verdict as alledged, and the Venire Facias Returned before other Judges then the Court was said to be holden, Judgment reverst. (53) Error.

Commissioners of Sewers *and* Newburg. *Saturday,* Novemb. 17.

ON Certiorari the Defendant justified distress for an Acre-tax, and whither this was good or not: And the Court conceived this not a fit way, being to put the Commissioners to enquire of the value of every Acre; but on Return of the Orders by Certiorari this Court cannot determine it, but the Commissioners must, and in trespass or Trover it may be proper, and ex motione Jeoffryes a Precedendo granted. (54) Sewers.

Hill *and* Boomer.

ON Demurrer in Prohibition on 25 H. 8. Cap. in Citation to deprive the Plaintiff against 25 Car. 2. Cap. 6. for not shewing Orders of Priesthood Presbyteratus, no person being capable without Orders on 14 Car. 2. Cap. 4. §. to administer Sacraments, the Plaintiff being pardoned he offered to plead that, and that he at Induction was ordained Sacricola, and not Lay. Masters prayed a Consultation upon 13 Eliz. Cap. 10. that the pardon doth not on Dyer 293. make Lay-man capable, and Priest or not is triable only in the Spiritual Law; which the Court agreed, but adjornatur, to examin amendment, and it was said that Priest or not such a day, is triable at Common Law. (55) Encumbent.

Bastard

Baſtard *and* Stukely. *Mich.* 23 Car. II. *Rot.* 69. Ante.

(56) Legacy.

MAſters. 1ſt If the Joynt-tenancy maintain this Prohibition, and he conceived not, the Spiritual Court having Attachment, Prohibition Br. 34. and Kell 110. 33. 2 Roll. 289. 5. and Yelverton 172. and 2 Browl. Starkey and Gore, Jurisdiction of the Principal legacy, and 1 Roll. 426. Mortham, and 2 Bulſter 227. Parker and Kemp. 2. The aſſent to the Legacy doth not determin it or take away the Jurisdiction as Bond doth, and this Libel is for two parts of four parts of eight parts of the Reſidue, and of a certain part no ſuit lieth at Common-Law: Deviſe Br. 6. Alſo 3. The refuſal of the plea will not maintain the Prohibition, as in 3 Cr. Wrights Caſe, and Green and Buſſkins Caſe, and Hob. Wright and Gerrard, and 6 Co. 23. Morris and Eatons Caſe was on a Statute which binds all, and therefore refuſal is Traverſable; but per Curiam the aſſent determins the Legacy, and the refuſal is the main: and Trover lieth here as well as by one Tenant in Common of the eighth part of a Ship; & per Curiam a Prohibition awarded, but without the aſſent they ſhould determin the Joynt-tenancy, having Jurisdiction of the Principal. Judgment for the Plaintiff.

Beverſham *and* Osborn. Ante.

(57) Tender.

IN debt for Rent, the Defendant pleaded he was alway ready, and yet is, bringing the mony into the Court; to which the Plaintiff demurred, becauſe no demand being neceſſary where there is a time and place certain, and ſo is 1 Inſt. 202. 210. and 6 Co. eſpecially this is no plea in Bar, as here, but only in excuſe of damage: Alſo to ſay he was always ready a Feſto, and doth not ſay at the Feaſt, the Defendant agreed, its no plea in Bar, but in excuſe of damages it is, Co. Entries 154. and Raſt. 159. 1 Roll. Damages 571. and 1 Inſt. 32. and 10 Ed. 4. 16. and 14 Ed. 4. 4. and Tender Br. 18. But per Curiam, on 22 Ed. 4. 6. there muſt be an obtulit & uncore Priſt as to the duty it ſelf. And by Wild Juſtice as to debt and damages where its for duty at a certain day, touts temps Priſt, is not ſufficient. And Judgment for the Plaintiff.

Nota,

NOta, That the opinion of C. B. was said to be, that the Spiritual Court may grant Sequestration upon Impropriate Parsonage, for not repairing the Chancel of the Church, Quære if they can do it for not repairing the Parsonage-house; but clearly they may Excommunicate the Impropriator for both notwithstanding the Statute of Dissolutions. 37 H. 8. Cap. 21, §. 3. &c. (58) Church.

Ingraham *and* Bray. *Hill.* 28 & 29 *Car.* II. *Rot.* 49. Ante.

ON 2 Cr. 300. & 487. Poph. 186. Bridgman 123. and Hen. and Hamson's Case Polyxphen in Replevin conceived release of all Actions, Debts and Demands by devisee of a Reversion to the Executors of the lessee of the Land doth not extinct the growing Rent, the Personal contract being determined. But by Twisden Justice, there is no difference, and Lit. Sect. is plain that it doth extinct. 2. The Avowry is here in his own name, in Bar of which the Plaintiff in replevin pleads a former Conusance, and Judgment against Rurdler and J.S. in C.B. for the same Heriot; to which the Defendant demurred, and that fell for want of averment of one of the lives, as appears by the Conusance: Also its not averred that the Conusance was made by command of the now avowant. Mr. Trevil, but the Conusance being pleaded in hæc verba its well enough, for the Conusance appears to be by his order, which the Court agreed, Præter Twisden, who held it ought to be averred, so here, because on Stiles Eels and Lambert, defective avowry is no bar in a new action. 3. The averment that the former avowry and this were for the same thing, whereas they were both Conusances; yet being that the Heriot was then and now the same, its well enough by Hollis for the Plaintiff: Also the Heriot was due on the death of three Lives successively dying, sicut nominantur in Charta, and the Plaintiff averrs that John the last life died first, and so no Heriot due: Also the growing Rent is here discharged by this Release upon 2 Roll. 408. tit. Release 3 Cr. Moor 606. 13 Co. the Court conceived the Heriot due on death of John, albeit not on death of Anthony and John. Jones on 2 Cr. 170. conceived the growing Rent not releast. Et adjornatur. (59) Pleas.

Rodham *and* Stroher. *Trin.* 29 Car. II. *Rot.* 262.

(60) Arbitrement.

DEbt on Obligation, on Oyer it appeared to be to perform an award; on no award pleaded, the Plaintiff replieth and sets it forth, and breach by non-paiment, licet sepius requisitus, the Defendant pleads there was no demand; to which the Plaintiff demurred, & per Curiam, there needs no demand of money awarded to be paid by a day, but licet sepius is sufficient: also the pleading a demand is a departure after no award pleaded; and Judgment for the Plaintiff, for the Defendant must tender it to save penalty of the Bond.

Price *and* Davis. Ante.

(61) Trover.

TRover de 10. Juvencis Angl. Heifers and Steers. Mr. Attorny said it was well enough, as Lufton and Johnson, de ovibus matricibus & agnis, being on doubt whether they were couples Ews and Lambs, or Ews with Lamb, but per Curiam on Stiles 416. pl. Judgment Reversed, Nisi, but the parties agreed to accept a plea and try de novo.

Dutton *and* Pool. Ante.

(62) Assumpsit.

ON Stiles pl. Vachell and Collard 1 Roll. Abr. 31. Thomson for the Defendant, that the Father should have the Action and not the Son. But by Twisden of Counsel in that case it was ruled that either might have it; And Norris and Pine in C. B. on Marriage with Eliz. daughter of John Norris against Sybel Norris, on promise by the Father to pay to the daughters Children on her death 4 l. per Annum, and action upon the Case by Pine, who married one Child, and Uxor, adjudged for the Plaintiff. But by Twisden Justice, this was not for Portion as the Case in question is; but if this had been on forbearance to cut the Wood to pay on the Plaintiffs marriage the action would lie; and though this was not to pay to the Children generally, but to the Plaintiff in particular; yet being no party in the consideration nor acting any thing therein, per Curiam, Præter Twisden, Judgment for the Defendant being no more by Wild then

then on Sale of Horse, the Defendant promiseth to pay to the Vendors Son, the action lieth not by the Son, and notwithstanding 1 Roll. Abr. 32. and Stiles pl. Starky and Milny, the promise being not to the Plaintiff to pay her the money, but only promised to the Father to pay to the Plaintiff, and in all the other cases all parties were present when the promise was made, & nil Capiat per Billam awarded.

Smith *and* Tracy. *Pasch.* 28 Car. II. *Rot.* 533. November 20. Ante.

(63) Administrators.

TWisden absent, the Court were of opinion that the half Blood is no Impediment, but that such half Brother may have distribution and Administration may be granted, Stiles 75. pl. to such half Blood, and so was the opinion of the Delegates, and 3 Cr. 825. Gately and Swan, and so Consultation was awarded.

Nendick *and* Stuit.

(64) Lieu.

SArjeant Maynard yesterday in C. B. opposed Prohibition to the Sheriffs Court in London in Woodstreet Counter, in Assumpsit for Nursing a Child, being granted on Suggestion, and Affidavit that cause of Action arose out of Jurisdiction at Fulham, because this was made after a Verdict, and the parties admittance of the Jurisdiction, and no refusal of any plea nor tender of it below: And this Scrogs Justice agreed: But per Curiam, this is void, and Coram non Judice, and so the admittance of the parties nor Verdict gives no Jurisdiction against the King, and the Prohibition is more for the King than the parties. Sed adjornatur.

Audly *and* Wells. *Hill.* 26 & 27 Car. II. *Rot.* 713. Ante.

(65) Information.

ON Special Verdict on Car. 2. Cap. 5. the question was who should be said the Original prosecutor, whether Colston the party named in the Record of the Information should pay the Costs, or the Defendant Wells, by whose direction the first suit before the Sub-Commissioners was, and the Appeal after; And by Sarjeant Barwell on 18 Eliz. Cap. 5. the par-

ty named is the party Originally prosecuting, and the party directing is rather a maintainer, and punishable by Information; and this may go higher to the Commissioners of Excise or Lord Treasurer, who direct Informations, which is not reasonable. But by Rainsford, Wells and Colston, being both appointed Prosecutors, and both to have equal share; therefore the using the name of either is but as a nominal person: But the Statute provides as well against oppression of the Subject as for the Kings Tax, and therefore by Jones Justice, the person most visible is lyable, for else the direction being a thing secret, there could be no certain remedy: And by Wild Justice its not found that Colston knew of this Information, but being found that Colston in proper person did exhibit the Information to Sessions and Sub-Commissioners, the Court agreed that he is the Original Prosecutor. And Judgment for the Defendant.

Smartle *and* Schollard. Ante.

(66) Devise. The Court conceived that the Wife shall not take by implication, but only for necessity where the devise is to the Heir, but it shall discend to the Heir in the mean time. And Judgment for the Plaintiff.

James *and* Richardson.

(67) Remainder. IN Ejectment on Lease of Durdant, Special Verdict find Weekes seised in Fee, and devised to Higden and Uxor, and their Heirs Males other Lands, and the Lands in question to John Higden and his Heirs, during the life of Robert Durdant the Son of Andrew in truft, that Robert Durdant take the profits; and that no waft be, and that R. D. release as to the other Lands to John Higden and his Wife, and after the decease of R. D. to the Heirs Males of R. D. now living, who had one Son G. the lessor of the Plaintiff and devisee, Higden entred, and infeoft Spore; and Tenant for life and Gideon and George Durdant levied a Fine to Spore, who conveyed to the Defendant: The question was if George the Son of Robert took an Estate in Contingency or presently vested. And by Squib for the Plaintiff, these words import a present Estate vested in George in the life of Robert, the Heirs now living respecting the present time; Lex J. C. verbo Nunc, so the devisee is to be a present person and not to expect, especially it being added and to such other Heirs Females as shall be after born, which Co. Mildmayes Case, and Lex

J. C

J. C. Verbo Alius, this diſtinguiſheth the Heirs: Alſo 3. the large ſenſe of Heir extends to the Son in life of the Father eſpecially in Common parlance, as F. N. B. 90. H. 143. R. and Regiſter 98 & 99, & 3 Ed. 4. 12. Writs are often in this manner, and this ſenſe muſt be accepted or none elſe can; the deviſor intending ſome perſon in Eſſe, and the words now living cannot refer only to Robert Durdant now living, becauſe Robert D. is named fully before in the deviſe to Higden in truſt for Robert D. the Son of Andrew, and he is named five times before, therefore the ſaid R. D. needs not other deſcription, but (now) is neceſſary to diſtinguiſh the preſent Heirs from thoſe hereafter; and that its ſaid to Heirs its not intended that all his Heirs might be then living, but that the Heirs now living take and include thoſe in Remainder, and as in the Common caſe of Purchaſe, plura'es numeros Convertit in ſingularem: Alſo it would be no Inheritance, unleſs the ſaid Heirs which is not a limitation or Habendum only, but of Purchaſe in ordine Succeſſorio carrying the Land in the Line as in Tail, 23 & 2 Ed. 3. 1. and 1 Inſt. 26. John de Mandevills Caſe, and had the deviſe been to the Heir Male now living, George the Son of Robert ſhould take; and as 30. Aſſ. 47. The word Heirs will not alter the Caſe. And if 4. this be Contingent it would follow that Heirs Males muſt be taken ſeparately, in caſe of Ambiguity, 2 Bulſtr. Roberts Caſe, Contingencies being odious are to be avoided, and as to Hob. 29. and Moor. 86. pl. Counden and Clerk, between the Heir and a Stranger, as 1 Cr. 368. but here is no Heir concerned: Alſo there the words Heirs were inſenſible, here they are ſenſible; alſo 1 Co. Archers Caſe. Saunders for the Defendant agreed that if George take by Remainder only in Contingency, then the Defendant hath title; if by Eſtate veſted the Plaintiff hath title; and here is no words in the Will to confirm it as an Eſtate veſted, but the intent was that the Heirs of Robert ſhould take as a Contingent, for non eſt hæres viventis in legal ſignification; and had a Remainder been limited to the Adminiſtrator of Robert D. now living, it would be Contingent, and Heir is as Contingent; and the deviſe to Higden was on purpoſe to preſerve the Contingent, for had the deviſe been immediate to Robert D. he had an Eſtate Tail: Alſo it appears that the Teſtator intended all the Heirs Males of Robet D. ſhould Inherit as a general Eſtate Tail, being not only to the Heirs of R. D. now living; but alſo, and to all ſuch other Heirs of his body as ſhould after be born Males or Females which were utterly void words: If George the Son take a preſent Eſtate Tail veſted:

vested; also had it been to George D. now living, it had been but for life in him, so he shall not have a greater Estate by Implication of the words Heirs, but the intent was that the Heirs should take by limitation, especially here being a Remainder over to Gideon Durdant, and without the words now living there would be no color of Objection, for 1 Inst. an Heir by Purchase must be perfect, and now living will not vest any Estate that cannot vest as Heir; the Court conceived this an Estate vested, and no matter whether it be an Estate for life or in Tail, here is a forfeiture by the Feoffment, and it is the apparent intent the devisee should take presently; and Higden was the Knave that broke his trust by the sale to Spore who took but in trust for the Defendant. Adjornatur.

Banes *and* Lowder. *Friday*, November 23.

(68) Ordinary. SArjeant Weston prayed a Prohibition to the Prerogative Court of York, on Libel there against the Plaintiff for an Orphans Portion; and to deliver up the body to Custody of the Defendant, because the Ecclesiastical Courts have nothing to do with the body: Which Rainsford Chief Justice and Jones agreed; and though the Parents had made no disposition thereof, by 23 Car. 2. Cap. §. yet a Prohibition awarded, Nisi, for the Ecclesiastical Courts cannot meddle with the body, but only with the Portion.

Clerke *and* Payter. *Saturday*, Novemb. 24.

(69) Merchants. IN Trover by the Plaintiff, Officer of a Tyde Surveyor of Customers for foreign Bacon seised by Edmund Clerke, and by him sold to the Plaintiff Henry; the Defendant claimed as having first seised part, but not these in question; but sued a Replevin, and on 18 Car. 2. Cap. 2. §. 1. and 20 Car. 2. Cap. 7. §. 2 & 3. the Defendant insisted on it, that he being an Officer under a Tyde Surveyor; and the Plaintiff having not proved his property, this is not sufficient to make the Officer guilty. But by Rainsford Chief Justice that the Replevin is sufficient being never executed: but yet the Goods divided notwithstanding; And by Jones its time enough to claim property after the Replevin, and the Servant is finable if he sueth a Replevin wrongfully. 2. The Goods were first seised by Edmund Clerke at Blackwall, where Edmund was

was no Officer nor Inhabitant; but his Family lived in White-Chapel, but was seised by the Church Wardens in Allhallows Barking where they landed first; yet the first being at least a seisure in fact. Williams for the Plaintiff said it was sufficient against all others who have no property; but the Court conceived no property can be taken from the party unless he be an Officer or Inhabitant not only within the Parish, by having a Room to keep his Office in; but likewise an Officer or Inhabitant of the Parish that hath his Family or chiefest residence there; but a Lodger is not sufficient to seise. 3. A Covenant seisure is not sufficient, but it must be actual. 4. The Defendant seised below the Lee two Leagues off at Sea, which was supposed sufficient: The Importing the Yams being the forfeiture and not the Landing; and so the Plaintiffs seisure was but a reseisure and so not sufficient. But by Rainsford it not appearing the Parish had any share in that seisure, its void; but by Jones 18 Car. 2. Cap. 2. §. 1. refers to 15 Car. 2. Cap. 7. §. 13. which gives forfeit of so much per Head of Cattle Imported into the Kingdom. And Verdict for the Defendant.

The Inner-Temple *and* Ince. *Monday*, November 26.

The Defendant being an Attorny of B. R. was ordered to attend on Complaint for deteining Rolls of Commons signed by one Graham, who was on contested Election on Appeal settled Puncipal in Cliffords-Inn by the Benchers of the Inner-Temple, but on Appeal thence to the Judges one Summers being chosen by the rules was confirmed, and Ince siding with Summers was put out of Commons, and yet came in after, and would not submit to the Order of the Bench: Whereupon Rainsford Chief Justice said he ought to be committed; Jones said he only ought to be bound to Good behaviour, in regard here was no Appeal to the House as to this, and so nothing was done, but both agreed that according to the Orders, 6 Car. 1. by Lord Chancellor, and all the Judges, and 16 Car. 2. by Lord Chancellor Hyde and all the Judges, the Inns of Chancery are subservint to the Inns of Court in matters of Commons and Exercise. But Jones said this was only on Appeal, not Originally until there be a failer of right in the Inns of Chancery. (70) Priviledge.

Dutton

Dutton *and* Pool. Ante. 830. pl. 62. *Tuesday*, November 27.

(71) Assumpsit.

Serjeant Gregory for the Plaintiff prayed Judgment; the Case of Pine and Noris in C. B. was a promise by Feme before Marriage to pay to the Children of the Copyholder on Surrender by the Father, and held void, because the Children were not entitled to the Estate; as here the Plaintiff was to have a Portion, and comes not to this case, which the Court agreed. And Judgment for the Plaintiff, Nisi.

Dominus Rex and Coats.

(72) Excommengement.

The Defendant a Feme Covert prayed to be discharged of Capias upon Excommengement returned hither for non-paiment of Costs on Libel against her for Incontinence, being by Levins not within 5 Eliz. Cap. 23. §. 12. which the Court agreed, and the Capias was discharged. But it was said by Rainsford and Jones, the rest being absent, that had she been taken by a Excom. Capiend' it had not been avoidable but by plea, &c.

Dominus Rex and Price.

(73) Excommengement.

Williams prayed the Defendant might be Bailed on Habeas Corpus, from Chester, Returned that the Defendant Virtute Brevis mihi direct' Commissus fuit in Custodia mea, &c. where if he were in Custody before, it should be Oneratus, if not that Virtute Brevis Cepi Corpus, and in Custodia detent. &c. and thereupon he was Bailed on Excom. Capiend' for not appearance; and so was one Loe on Habeas Corpus the beginning of this Term.

Dominus

DE
Termino Hillarii

29 & 30 *Car. II.* in *B. R.* Anno 1677.

Wednesday, Jan. 23.

Rainsford Ch. J. } *Jones.*
Twisden. Jan. 24. }

Hoyl *and* Lundon.

EX motione Levins to stay Execution of Goods in the Sheriffs hand, being the Wifes, as Executrix to her former Husband, and taken for the present Husbands debt, which Raynsford Ch. Justice, and Jones denied, because by payment of the debts of the former Husband, these Goods may be the Wives own, and this Court will not try this on Affidavit. And by Raynsford Ch. Just. in Nordens Case, *supra*, last Term it was held that Execution against the Goods of the Executor for debt in Jure proprio is a Devastavit nolens volens. (1) Execution.

Lower *and* Raynes. *Thursday*, Jan. 24. Ante.

HOlt excepted against Prohibition to the Archbishops Court of Consistory in York on Commission of Custody of Infant Legatee under fourteen to the Grandmother, who having no Lands nor Tenements, upon Swinb. 170. being in the Province of York where the custom is so to do where there is no other Guardian, in Chivalry Socage, or by nurture, in which case they do pretend to the custody, but this being only for prosecution and management of the Legacy given; never done but on giving security; yet by Twisden & Curiam the (2) Ordinary.

Rule for Prohibition was not discharged, because this might enervate the late Act 22 & 23 Car. 2. Cap. 10. b. but the parties agreed to accept the Declaration in a Prohibition, ex motione Serjeant Weston.

Buller *and* Waterhouse.

(3) Collusion. SPecial Verdict in Trover of Wood cut in Bradford, wherein Sir J. Maynard was seised of parcel in his own right, and of part Jure uxoris, and for affection, and on Marriage of his Son, and Portion setled to Lawrence for years, Remainder to Sir J.M. for life, &c. and another Deed declaring the several trusts with power of Revocation, which was for Jointure, &c. and Fine thereupon, and agreed that if Sir J. M. or Dame Mary his Wife after his, or after their death, the Son by consent of Rushworth, &c. may sell the Mannor of Battel, that they shall purchase as much to the same uses, Verdict find the considerations of Affection, Marriage and Portion extended to both Lands, that Sir J.M. is dead, that the Son is dead, and left a Daughter married to Buller the Plaintiff, and that Dame Mary without Revocation or consent of Trustees sold to the Defendant, concluding if the former conveyance by 27 Eliz. Cap. 4. be void against the Defendant as framed, they find for the Defendant, the Court conceived that they cannot judg this fraud unless it were expressly found. But Adjornatur.

Morris *and* Wilford. *Trin.* 29 Car. II. *Rot.* 497. Ante.

(4) Covenant. IN Covenant against the Defendant as Executor of Starling Special Verdict find Release by the Plaintiff to the Executors of all their right in the personal Estate of Starling, and if this were a Bar of this Action being made after breach by Suit for personal Estate of Garford, which by Jones is no more than Release of right to the Land by Debtee to Debtor or his Heir, as 1 Inst. 165. which is no Bar, yet by Raynsford Chief Justice, he can never have Execution against this Release, and here there is nothing lyable but only the Personal Estate, and therefore that is discharged by the Release, which Twisden Justice agreed. But Adjornatur.

Froud

Froud *and* Froud. *Friday*, Jan. 25. Ante.

SErjeant Maynard pray'd Judgment on the words that Plaintiff went to the house of Dean, and as 3 Cr. 308. & 2 Cr. 291. & Moor 409. b 3 Cr. 140. 3 Cr. 148. & 787. would have given him money to rob Gouldings house, & 3 Cr. 710. 1 Cr. 417. & 3 Cr. 293. 394. 747. Moor 419. & 3 Cr. 24. Polyxphen for the Defendant agreed the authorities cited, but said that since Eatons Case 4 Co. 16. the Judgments have been contrary on deliberation of the former Cases, 2 Bulstr. 206. & 4 Co. 15. b. 18. that a bare inclination without an act is not actionable, Kingston and Hulls Case, Godbolt and Lane 98. Scot and Hillier, Yelverton 90 pl. 3 Bulstr. 167. an Act was done: But per Curiam, the words are Actionable, taking all together, and Judgment for the Plaintiff. (5) Slander.

Dominus Rex and Harrison. *Saturday*, January 26.

IN Information in Latin, quod publicavit utteravit & propalavit falso & malitiose de & concernent' Gubernationem & Regimen Angliæ & de & concernent' proditores qui Regem, Car. 1. ad mortem adjudicaverunt quod Gubernatio Regni (not said Angliæ) consistit de tribus statibus; Ac si Eveniret Rebellio in regno nisi ista rebellio sit contra tres status non est rebellio. The Jury find at Guild-Hall the sitting after last Term that quoad propalationem verborum, (viz. quod Gubernatio Angliæ consistet de tribus statibus ac si eveniret rebellio in Regno nisi sit contra tres istos status ista non est rebellio) Guilty; but as to any other words in the Declaration Not Guilty; and Williams now excepted in Arrest of Judgment, that the Verdict is quo ad propalationem verborum, viz. &c. in Latin, whereas the words were spoken in English; sed non allocatur, for on 36 Ed. 3. Cap. in all Indictments not founded on words in writing, and in all Informations the words are laid in Latin, and so are Informations of Perjury, and may be either way good. 2. It was said these words may be intended in mitiori sensu, that there can be no rebellion against the King, but it must be against the three Estates, which are all united to the King, sed non allocatur; for by 13 Car. 2. Cap. 6. it is expressed, that both nor either House of Parliament cannot War against the King under any pretense whatever; and though it be granted that there are three Estates as to making (6) Forgery.

making Laws, there is but one authority as to War, and therefore all Indictments of Treason are contra Coronam & Dignitatem, & 1 Eliz. Cap. 2. §. 2. is to be intended only as to Laws making. 3. It is said Gubernatio Angliæ (not Regimen) which is the Administration of power not the original of it; sed non allocatur, for loquendum ut vulgus, both have one common import and sense; & per Curiam, Judgment for the King; and Thursday Febr. 7. he was fined 1000 l. and found surety of good behaviour seven year, and to renounce his error in open Court, and he brought error in Parliament.

Pagit *and* Vossius. *Thursday*, Jan. 31. *Trin.* 26 Car. II. *Rot.* 583. Ante.

(7) Devise.

RAynsford Ch. Just. delivered the opinion of the Court for the Defendant; The Estate of Mrs. Heningham, being to take effect from D. Vossius's death or restoration, neither of which are yet happened, for in this case the Exile is intended compulsory, the Doctors coming hither being on displeasure of the States, and taking away his Pension, and being extra solum, he is an Exile within the notion of the Devisor; and as this Case is it appears not by the Special Verdict that this Exile is determined, the causes yet remaining of the States displeasure, and taking away his Pension, and the Devisor intended this for his support; and that the War with the Dutch is determined, is not material, being no cause of his Exile, he being come hither before; also it doth not appear the Devisor had any regard to the Wars, nor can the War be collected to be his intent, wherefore he continueth still an Exile as he was at first. 2. If it were doubtful on the Will that this limitation were void, yet this would not mend the Plaintiffs case; for if this be void the Plaintiff cannot have the Estate until after the death of the Defendant, but it shall descend to the heir of the Devisor in the interim, and so Quacunque via data, its against the Plaintiff, being not found heir to the Devisor.

Dominus

Dominus Rex and Plum. Ante.

POlyxphen for the Defendant demurred to Indictment of Defendant for using artem Pomarii, Anglice, a Fruiterer, which is not within the Statute of 5 Eliz. Cap. 4. §. 31. which extends not to Arts that require no skill nor cunning as this of a Costermonger or Fruiterer doth not, 1 Cr. 499. so of a Hempdresser, Thatcher, was held not within this Statute; and in Sellers Case, this Case is so cited, and so 2 Bulstr. 188. and said to be affirmed in Error. 2. The Indictment is presentat' extitit, that the Indictment following is Billa Vera, which latter is no presentment of theirs; Dalby Recorder for the Plaintiff, that the meaning of the Statute was that none but men skilful should exercise Trades, and there is great mystery and skill in a Fruiterer, which is not bare setting up a Stall, but to sort Apples, and pack them up to send beyond Sea, and spend in several Months with several Terms of Art, and before this Statute these were a Company in London before the Statute, and in 2 & 3 Edw. 6. Cap. 16. taken notice of; and private men may Trim, yet a Barber hath been adjudged in Woods Case within this Statute, and it hath been adjudged in Exchequer that a Brewer is within the Statute, and so 2 Cr. 178. is, and this is averred a Trade at the time of the Statute, which is confest by the demurrer; but by Twisden the Averment will not make that a Trade that is none, no more than a Horse a Cow; but by Jones all matters of fact are confest by the demurrer, and therefore it must be intended a Trade, and its taken notice of as a Trade by many By-laws in the City, and is a Company of the Livery. The Court inclined strongly that this is no Trade within the Statute of 5 Eliz. Cap. 4. no more than a Gardener, and that to allow them a Trade within the Statute would tend to ingrossing the sole buying and selling of Fruit, but the Plaintiff said he would give no Evidence of buying and selling to make a Fruiterer, but only the skill in the Trade. But Wild absente adjornatur. (8) Market-overt.

Holt

Holt *and* Berry. *Friday*, Febr. 1.

(9) Arbitrement. IN Indebitatus for Wares sold, Winnington Solicitor excepted against Attachment granted Nisi upon breach of award of the three Foremen of the Jury in not giving Releases according to the Award, having on report of Secondary received the money awarded, and at Oxford in a Case of the now Duke of Norfolk, he said the difference was where parties refused to submit or revoked; but where they have submitted and attended, and an Award made, remedy ought to be taken on the Award not for the contempt in breach of the rule; sed curia contra, this being a setled course now ought not to be receded from, especially the Defendant having received the money which must be as paid, and an Attachment was granted.

Harris *and* Tosier. *Monday*, Febr. 4.

(10) Executors. POlyxphen prayed a Prohibition to libell against Executor of Administrator to account, upon Miller and Millers Case, here being an Inventory put in, and an Obligation for distribution given by the Executor to the Administrator during Minority of the child after the childs death, because an Action at Law lyeth on this Bond, and on plene administravit all will come in question; also the Executor is not lyable to Account there, but only for Goods in his own hands; which Raynsford Ch. Just. and Twisden agreed, and a Prohibition granted, Nisi.

Rose *and* Standen in C. B. *Tuesday*, February 5.

(11) Account. ACcount against Baily ad proficiendum; the Defendant pleads former Action upon the Case laid as Indebitatus & insimul computassent, and Verdict for the Defendant, and prayeth Judgment si actio. Says Sarjeant for the Defendant, had the Verdict been for the Plaintiff by Averment it were for the same thing, it were a Bar, and its all one here; but by North Ch. Just. the former way of demand is no Bar to the latter, unless it were agreed in the same thing, and recovery had, which the Court agreed, and Judgment for the Plaintiff, Nisi; but the Defendant agreed to pay Costs, and take Issue, ne unques Resevior, or Baily.

Steed

Steed *and* Beryer. Ante.

SPecial Verdict in Ejectment find Devise of the Land to Robert the Son, and to Robert his Grandchild a 100 l. after which Robert Berrier the Son devisee also of other Lands, died in devisors life time, after which by new Codicil devisor devised part before devised to the Son, to Daughters, and by parol declares after that his Will should be effectual to his Grandchild the Defendant, and the Daughters; And Heirs of the Elder Brother are Lessors of the Plaintiff, and if any thing passeth by this Will to the Defendant, for the Defendant. Baldwin Serjeant for the Plaintiff on Pl. Com. 344. the devise to the Son is void; so 3 Cr. 243. he dying in life time of devisor for the whole, so there are now no words in the first Will that can convey to the Grandson, nor in the Codicill which giveth only to Judith a Daughter, and the republication and declaring by parol that Robert the Grandchild should take as Robert the Son should have taken, cannot pass the Land to the Grandchild, because at Common Law none could devise Land before 32 H. 8. Cap. 1. & 34 H. 8. Cap. 5. but only in Boroughs, and here are no words in writing within this Statute sufficiently to carry it; but if the words declared had been in the Codicill it might be a Will in writing, 1 Roll. 615. tit. Revocation, a parol revocation is sufficient, but not to make a Will nor to alter it, and here the Grandchild is a Legatee, so cannot take by Intendment; and the two Closes devised to the Daughter by the Codicill shall not be destroyed as it must if this parol Declaration be good, as Pl. Com. 345. b in Bret and Rigdens Case is full in this point; and Moor 353. 3 Cr. 423. Fuller and Fullers Case cited to the contrary was a devise to Richard in Tail, Remainder to Edward, which is the reason given by Popham and Fenner why Thomas the Issue of Richard in Tail should take as Purchasor, because there being a remainder over, the devisor intended not the Remainder to take till the Tail spent; but the Case in question being a Fee, and the Will void, it cannot be set up by the latter Declaration; and Moor 404 pl. & 3 Cr. 493. Beckford and Parnacots Case was because the words of the Will pass all his Lands in A. and so the new publication is sufficient, but here are no sufficient words in the Will it self, therefore the new publication is not sufficient but must create a new Estate (12) Nota.

to the Grandchild, and there is no authority of Law where a new publication will carry an Estate to any person not named in the Will; and intent of parties must be governed by the rules of Law, as Hob. Counden and Clerks Case. Weston for the Defendant, That there is no title found for the Lessor of the Plaintiff, being only found Daughters of the Lessor of the Plaintiff, but not Heirs, though the Lessor be found dead, and to leave such Daughters; sed per Curiam, this is sufficient enough. 2. There was no Son living at the time of the devise, therefore the Grandchild shall take by that name; yet agreed the authority of Bret and Rigden Case, Pl. Com. 345. and that a meer publication by parol will not be sufficient within the Statute, but here is a sufficient Averment found to shew the Testators intent, Son and Grandson differing only as Elder Son, and younger Son, both are Sons, and a reputation will be as sufficient for Grandchild to gain the name of Son as for a Bastard in 6 Co. Sir Moyl Finches Case, but if there were any else capable by the other denomination it would alter the Case, but here the Will would be utterly void unless this sense be admitted, and this is within the reason of 5 Co. 68. Chenyes Case, and 8 Co. 155. Altham, where the Brother could take no Averment that the proviso concerned him, because he was not of the same name; but allowed that had they been of the same name such an Averment or republication were sufficient, 2 Roll. 618. tit. Fines, and Moor 404. Pl. is full in this point; and Otway and Braithwaits Case adjudged here this Term, supra cannot be supported but on this reason, for it was agreed unless the Town and Parish were both of the same name, there had been no ground for such an Averment of the intent to pass the Lands in the Parish contrary to the Writ that supposeth the Will; and here both the names are capable, and the republication of the Codicil is also a republication of the Will; and Yelverton 209. Wallop 3 Cr. 9. the Codicil is as an exception to the Will, all being as one, 1 Cr. 23. but the Verdict was of devise the twenty ninth of October 1669, and that the Son Postea, viz. the third of December 1668 died, which per Curiam is well enough. Yet by Weston, As devise of Chesle, there being no other Lands, passeth Lands in Cheston, which is stronger than this. North Chief Justice for the Defendant, Had there been both Son and Grandson alive at the publication there

there could be no Averment, because it would be improper; so on devise to Son a Bastard cannot be averred to take, but to make certainty, as on devise to Thomas having two Sons, so there may be an Averment also, had the devisor had no Son Robert, or had Robert been actually dead before the Will was made this might be good to the Grandchild as to reputed Son where there is none else by that name, also the Republication makes the Will as new made, and upon the new making of the Will, if there be no Son the Grandchild may take by that name, and therefore he conceived the Averment well here. Windham Justice agreed, the names here being the same, and the Will void at first, but by Republication is taken as new made, so is but a devise to the Grandson by the name of Son, which is good enough, there being now no other, and this but an addition. Atkins doubted, yet agreed an Averment may be of force upon a witten Will for certainty, but not to contradict the Will, as Pl. Comm. 345. e Brets Case; but here the parol Declaration agrees with the witten Will, yet shall not alter the sense and intent of the party when he writ it, as where a man gives all his Lands in D. and after purchaseth more Lands in D. and after by parol republisheth his intent that all his new purchased Lands should pass its not sufficient, for this would defeat the Statute, and transfer Lands by a parol Averment, on which only the devise to the Grandchild depends, but if the former Will had been transcribed altering the date, this would pass the Land to the Grandchild by the name of Son, but here at the time of writing the Testators intent was to the Son, and this must carry the Land, and cannot be altered by Averment parol. Scrogs Justice accord that the true intent of the devisor is not to be altered by a form of Law; and in the Cases of Averments the incertainty was only in the person, but here there was a Son when the Will was made, and meant to take, therefore another person that may be meant by construction shall not, which would overthrow the intent of the Statute, for this is as notoriously another person as if he had been another person, and they both concluded for the Plaintiff. North Chief Justice said, It would be good by the Republication without any Averment, as where the devise is to Thomas, who after dieth, and after he hath another Son

Thomas, and then republiſheth, this is a change of the perſon, yet is good being as a new Will, it being not a Will by the writing, but by the publication, which Scroggs agreed, but a new publication will not paſs any thing which the firſt Will is not capable to paſs. Sed adjornatur.

Harward *and* Hilliar. C. B. *Wedneſday*, February 6. Ante.

(13) Covenant.

IN Covenant to abate as Land ſhould be ſold for the Plaintiff the Heir, ſo as notice be given of the ſumm ſecundum formam conditionis to the Defendant that he might provide a better Purchaſor. North Chief Juſtice delivered the opinion of the Court, That it ought to be ſaid in writing to the Executor, which is a full exception, albeit the Covenant do follow the intereſt in the Land, yet the notice it ſelf is Collateral. And Judgment for the Defendant.

Webſter *and* Batch.

(14) Wayes.

IN Treſpaſs the Defendant juſtifies for Way to his Cloſe, which he and all thoſe, &c. have had as belonging to his Cloſe at D. The Plaintiff replieth that the Hay was growing upon another Cloſe, to which the Way did not belong, and the Defendant by fraud uſed this way, & per Curiam this being a Private Way, this cannot be diverted; and therefore Judgment for the Plaintiff.

Nendicke

Nendick *and* Stuit.

IN a Quantum Meruit and promise in London, for Nursing a Child in Fulham on non Assumpsit, and Verdict for the Plaintiff; the Defendant suggests that the cause of action arose out of the Jurisdiction, and thereupon had a Prohibition, Nisi, which the City opposed and alledged they were ancient and have Jurisdiction of the matter. Serjeant Baldwin for the Plaintiff, that it was before agreed a Prohibition would lie; and it will lie as well after all Proceedings in Inferior Court for cause out, being Coram non Judice; and therefore 2 Inst. 601, 602. resolved that the parties agreement cannot give a Jurisdiction, and therefore ever since Prohibition has been granted after sentence, 2 Inst. 607. The very Plaintiff himself may suggest this to the Court and have Prohibition; and this is frequent in B. R. and here to the Court of Marches, of things above value, or in an English County, a Fortiori the Defendant may pray it. 2. If this Court should not grant a Prohibition at any time it would be in the Power of the Attorneys and Council of the Court to give Jurisdiction to any Cause whatever, though it arose out. 3. The Kings Courts at Westminster are intrusted to keep inferior Courts within bounds; whereby the King loseth his profit by Fines and Amerciaments. 4. To avoid Circuity of action a Prohibition shall be granted, and if the Sheriffs Court should give Judgment, and the Defendants Body and Goods be taken in Execution, Trover, Trespass or false Imprisonment lieth, because there is a Nullity in the Judgment; and in debt upon this Judgment it might be avoided by plea that its out of the Jurisdiction, and Trin. 26 Car. 2. Rot. 1965. Squib and Hole, escape against the Goaler of Eling in Somersetshire, on Special Verdict it was found the cause of action arose out of the Jurisdiction of that Court, on whose Process he was imprisoned, after arguments here adjudged for the Defendant, though the parties by plea had admitted the Jurisdiction; and as a stranger here shall take advantage of it, much more the Defendant, 22 Ed. 4. 31. by Callo, the same Law in London or where there is any particular Judge; contra in Westminster that are Universal, so 10 H. 6. 13. of the Marshallie, Judgment there is no estople to say cause of action was not in Jurisdiction in Scire facias or Debt or on Execution; therefore they may well be now stopt to give such a Judgment as would be void; the objection was by Keble, because the Sheriff was Judge (5) Lieu.

Judge of parcel of the Cause, therefore Trespass lieth not but false Judgment; but here they have Jurisdiction of no part of the Cause, and therefore there is a nullity in the Judgment, and the Objection, 9 H. 7. 12. pl. comes not to this case, for the admittance there concludes, because the Patent of exemption is but particular, & Quilibet potest renuntiare Juri pro se Introducto, and W. 1. Cap. 35 in 2 Inst. 239. is upon the same reason the party may wave the remedy of damages given to him: and also there the Courts had Jurisdiction, but here they had none. Another objection upon 12 Co. 77. where a Prohibition was denied to Admiralty after sentence for cause on Land, because it appeared for vexation: Also the Objection that appears not on Record to be out of the Jurisdiction is no cause to give Jurisdiction, for they below in Courts Ecclesiastical and Temporal do always lay it Infra Jurisdict. but its brought out by Suggestion Dehors: Also the Objection that there is no Precedent where it was demanded and denied, and the Prohibitions granted after sentence do strongly infer they may be granted any time before; this would have been no question in smaller Courts, and there is the same reason for all Temporal Courts as for Ecclesiastical, and F. N. B. 46. B. after Judgment in the County Court for five pound split into several actions, a Prohibition lieth to prohibit Execution, notwithstanding parties admitted the Jurisdiction, 15 Car. 1 in 2 Roll. 317. §. 2. tit. Prohib. there is the like Prohibition, per Curiam, to Temporal Courts generally, which must be supposed at any time: And notwithstanding the parties admission, another Objection was that this Prohibition would cause great disorder and mischief, which is no greater on the granting than on denial, since after Judgment it may by plea be rendred invalid; and the inconveniencies would be as great in London as any where to gain a Jurisdiction by parties consent, and a Prohibition is de Jure and not at discretion, therefore ought to be granted whensoever it appears that cause ariseth out of Jurisdiction; for albeit parties may be Estopt by their consent, yet this Court is not; and therefore may grant a Prohibition at any time. Sir William Dalby Recorder of London for the Defendant in the Prohibition; all the former arguments run, because the Courts have no Jurisdiction by reason of the nature of the Cause, not by reason its out of the Jurisdiction, and agreed that this Court may grant Prohibition as well after Judgment as before to Courts Spiritual and Temporal: Also where Defendants plead that the Cause is out of Jurisdiction is refused, and Judgment given thereon, Prohibition

hibition lieth also where it appears on the Record that the cause is out of the Jurisdiction, a Prohibition lieth at any time as on Citation out of Diocese, so 2 Inst. 601. is agreed; but as to the reason of the Comman Law of Tryals de vicineto, that holds not in Transitory actions, 1 Inst. 203 and Bullers Case 7 Co. 1. Debitum & contractus nullius sunt loci. on 2 Rich. 2. Cap. 6. there was some doubt, but since Co. Dowdals Case, there is none but may be laied any where; Also its the party himself Defendant below that suggests here to have Prohibition; also there is no Fine on Original Writs, so there is no loss to the party or the King by trial below, and because Jurisdiction ought to be pleaded in the first place, else its waved, and this is the reason of 2 Inst. 239. Also this case is most like to Citation out of Diocess, or to suit in the Admiralty for cause on Land, wherein constant course hath been in C. B. and B. R. that after Sentence no Prohibition shall be granted upon bare suggestion, so 2 Roll. 318. tit. Prohib. Pudseys Case, and 1 Cr. 97. a Consultation granted, so Hill. 1675. Spleen and Vanacer in B. R. on Libel by Church Warden against Lords of the Manor of Erith to repair the Wall of Church-yard which was in Kent, and Defendant Cited into the Arches; and here being Sentence, therefore a Prohibition was denied as to the time, but because the matter was not of their Conusance, therefore a Prohibition was granted, and after trial here against Vanacer the Lord of the Manor, a Consultation was granted; also there are many Precedents; Mich 22. Car. 2. Braxston and Sawkins after Verdict below a Prohibition was denied; Which Justice Twisden said had been often denied, but never granted, so Cox and Aubens Case in Thomsons Precedents M. 23 Car. 2. an Attachment prayed against Phylips Reader of the Inner-Temple to London: agreed by Hales Chief Justice and the Court, that Prohibition after Judgment should go upon denial of the plea, or where it appears to be out of the Jurisdiction; but if parties plead over, there can be no Prohibition upon a bare Suggestion, which also was Cary and Pierces Case, in Norma Curiarum, and 4 Inst. 231. Pl. Com. 327. between no matter where the cause arise, but where one party is a Stranger the cause must arise Infra Jurisd. but this must be pleaded by the Defendant upon Oath that it arose out, which strongly infers that if it be not pleaded no Prohibition shall be granted, and no Action of false imprisonment will lie upon a Judgment of cause arising out, so in false imprisonment on Trial in Dover. Hales Chief Justice refused Evidence that cause of Action arose out of Jurisdiction;

which

which was Barrets Case, and in the Admiralty after Sentence, Noy 67. Susans and Turner, a Prohibition denied on Suggestion that it was on Land; and this Case is stronger, for here is a Verdict that finds the cause arose in Cheapside within the Jurisdiction; and in B. R. a Prohibition is often denied to Ludlow upon a Suggestion of English County unless a plea be denied or the Court have no Conusance. Weston Serjeant said it was agreed in Cox and St. Aubens Case that after Imparlance this could not be pleaded; liberty tenere placita ousts not Superior Courts, but Cognoscere placita, if Conusance be demanded before Imparlance oust this Court; but in Transitory actions upon such Suggestion above, they shall not have Conusance, because by that means the Record here should be sent down. Which North Chief Justice and the Court agreed, and he said in the case of Ely he had Conusance, and appointed a day for the next Court, but the Record here is never sent down; but only Judgment quod sequatur below, which is a continuance of the plea. But by Weston where the Inferior Court have particular Patent exclusive of this Court they shall have it; hence also the exceeding bounds in place ousts them as to real actions. North Chief Justice, Its admitted the cause here arose at Fulham, and it appears by the Record it self, that the Nursing of the Child was at Fulham in Warda de Cheap, which is a fiction the Judge ought not to have admitted, and the Kings Courts here are not concerned in Interest; but as this Court is concerned to keep all Courts within bounds, which is the duty of the Justices, and its not in their discretion to obstruct Justice: Also the King hath granted them the Pleas and Fines thereon, that arise within those Inferior Courts; and B. R. hath only Jurisdiction in Middlesex, yet bring in all other places if once in Custodia Mareschalli: Also by this means all that trade into London may be drawn in here, and so the King might lose all his benefit of Pleas and Fines out of the City: Also though a Prohibition be not discretionary, yet the manner of taking Information to grant a Prohibition upon, is discretionary: Also had the party come before plea this Court would grant no Prohibition, but put them to plead below; and after plea the Court may refuse such a Suggestion, and refuse to examin where the cause arose; but here its admitted on all hands its out of Jurisdiction, in which case though the Court may refuse such a Suggestion by a Stranger, yet when all parties have agreed it, a Prohibition cannot be denied, the Eyes of the Court being open. Windham Justice ad Idem, Its not denied that any Court can pretend to more Jurisdiction than

than granted. But in Westminster they have a general Jurisdiction so do, not send Causes down for want of Jurisdiction, but to prevent Vexation, where it appears the Jurisdiction is granted away from these Courts; and admittance of parties cannot take away the Jurisdiction hence, where it appears they have none below; for by that means all Causes might be brought thither, and the finding of the Verdict is more of the promise than of the place: Also as to Officers being punished these Courts take great regard, yet parties shall take no benefit; and in the Case of Citation out of Dioces there lieth an Appeal which doth not here. Atkins Justice, The Common-Law hath set bounds to the Courts at Westminster, as well as to the Inferior Courts: The Chancery cannot relieve against Maxim of Law, nor after Judgment B. R. hath no power in Quare Impedit, C. B. in Appeal, nor Exchequer in Cases of Freehold, yet Courts are apt to invade on others, but unless in the particular of ac etiams this Court of C. B. hath incroacht on none, but all others on this; The Exchequer by debitor Domino Regi, and B. R. by Custodia marischalli: and were a Prohibition at discretion, great regard is to be had to London, who have Counsel and retain Council to Communicate with these Courts; but though the manner of granting Prohibition and the receiving it be in discretion, yet the Prohibition is ex debito: and doubtless where the King is particularly concerned he shall not be concluded, but a Prohibition may be after Sentence: Also here might be a question whether by Suggestion this Court after so far a Proceeding as Verdict or Judgment will examin the place where it appears not, but where any Artifice is used, as by alledging the Fact in Fulham in Warda de Cheap, this may be refused; but here the Record is well laid, and it appeared only in Evidence and on Affidavit that the matter was out of the Jurisdiction, and a rule by consent that it was out; which the Court agreed was not sufficient to grant a Prohibition. And by Scrogs Justice, this is not in the nature of the thing, but in want of a Circumstance of place, that they have no Jurisdiction; and its for the advantage of the Subject to admit this Jurisdiction or not, which if he refuseth he may come hither, or if any Artifice be used below to surprise this plea; and its as much in this Case ex debito of the Court to accept the examination of this Suggestion, as well as to grant a Prohibition when parties have been heard; else this Court might grant, but may or may not hear parties at discretion which were not Just: Also the Record is an Estaple, as well to say its out of Jurisdiction as well as to al-

ſign it for Error; and its the party here that makes the Suggeſtion: Alſo they have Fines and Amerciaments, & Capiatur below as well as above, which the King hath equal advantage of, as here; alſo Actions below may be preſently brought there, ſo they cannot do here without Writ; and therefore the Subject hath a benefit by the Suit below, Cheaper, and Sooner, and Eaſier; therefore the parties having admitted this Tryal, no Prohibition ought to go unleſs it appears on the Record, and here being no matter of Record before the Court, but argued by way of admittance which was now denied, the Court denied a Prohibition, and ſaid if there were no plea below, this Court will grant no Prohibition to obſtruct Juſtice, but will put the party to plead below, and if there be a Verdict this Court will not examin the Fact; and the Rule was in as much as it appears that the Cauſe is laid within the Juriſdiction, and the Cauſe is proceeded ſo far as Verdict, this Court doth not think fit to examin where the Cauſe aroſe, and ſo a Prohibition was denied.

Dominus Rex and Pine. *In* B. R. Ante. *686*

. Sal. 67. 381. Contra (16) Poor.

WIne moved to quaſh Indictment at Seſſions in Somerſetſhire, for not receiving Apprentice impoſed on him by the Overſeers of the Poor, on the Statute 5 Eliz. Cap. 4. §. 25. having Lands in the ſame Pariſh. Which Twiſden and Jones agreed; and Twiſden ſaid that on Conſultation with all the Judges of England their opinion was accordingly, that the Overſeers of the Poor could not force Apprentice on any that did not perſonally occupy Husbandry; and the Indictment was quaſht.

Sancoker *and* Sangar. *Thurſday*, February.

(17) Words.

SArjeant Maynard praied Judgment in Information for converting Copice Wood into Arable, Contra form. Stat. 35 H. 8. Cap. 17. §. 3. being after Verdict the want of averment that the (1 Cr. 408. Corbet Dyer 312. pl.) Wood was Copice at the time of the Statute is void, and ſo reſolved in the want of diſtreſs, Contra form. Stat. implying all neceſſary circumſtances. Gould contra, that this is the common caſe on 5 Eliz. Cap. 4. §. 31. where want of averment that it was Trade at that time is not aided by Verdict, though ſometimes becauſe of the length of time ſince averment of uſing it may. And by Raynsford Chief Juſtice this matter is Iſſuable, and the party is not brought within the proviſion of this

this Law without an averment. And by Jones Verdict aids not this want of averment, Not Guilty, not comprehending all the matter of the Statute: and Judgment staied.

Coldham *and* Senhouse.

ON Lovedayes Case. 8 Co. Levins praied a Venire facias de novo, on Special Verdict that find no Entry by lessor of the Plaintiff. Which Saunders opposed, because the conclusion is that if upon the whole the Plaintiff have title, for the Plaintiff, else for Defendant; but per Curiam Venire facias de novo, unless parties agree to amend. (18) Verdict.

Dominus Rex and Cory.

WIlliams praied Prohibition to Libel on Canons made Anno 1603, for keeping School in Norwich without License, which by 1 Jac. Cap. 4. §. 9. is 40 s per Diem, and by 13 Car. 2. Cap. 12. §. 5. Canons are not in force: Also this Prohibition is no stop to hinder action upon the Statute, & per Curiam, a Prohibition Granted, Nisi. (19) Ordinary.

Dominus Rex and Fanshaw, *&c.*

ON 5 H. 7. 3. Polyxphen excepted to Indictment for not repairing a Bridge ratione of Lands in B. & alibi, which is uncertain: Also on Noy 93. pl. it was excepted that this was to repair ratione tenuræ, and doth not say suæ. 3. The Indictment was before Jones, &c. Comissioners of Oyer, which on Commission Br. 24. must be only of such as were commited by them, and without Commission of Goal delivery, which is usual to the same Justices, they cannot Adjorn over before others, so 4 Inst. 164. §. and Dominus Rex and Nurse in 19 Car. 2. Conyers pro Rege, on 2 Roll. 96. tit. Justices, and 1 Ed. 6. Cp. 7. §. conceived that new Justices of Oyer may proceed on Prisoners committed by former Com. Kel. 159. pl. and 2 Roll. Abr. 625. 4. Also that its said that both person Indicted have not repaired, and doth not say nec eorum aliquis, yet on F. N. B. 126, 162. one having remedy against the other, on his being charged with the whole, and only one coming in and pleading, it could not be said nec eorum aliquis. Jones Justice conceived it well enough as to the Lands in B. & alibi. Sed adjornatur. (20) Ways.

Dominus Rex and Whitacre.

(21) Coron. ON Proces for Deodand, the Defendant pleads 25 Car. 2. Cap. 5. §. 30. b. and that he is a Subject born; the Plaintiff replieth that before the Act there was an Inquisition found by the Coroner, that Wheel of the Cart in question killed J. S. and thereby was vested in the King, and so not pardoned by the Act without words of restitution. Saunders excepted that this Proces is not on Coroners Enquest, 24 Car. 2. which found only the Cart; but on Enquest taken by the Sheriff, on 27 Car. 2. by a Melius since the Statute, and therefore the matter is pardoned, the value by the later Enquest being the main, and not the value in the Coroners Enquest, which is less, which Heath for the Plaintiff opposed, because this was a Misdemeanor of the Coroner that was depending before Mich. 25 Car. 2. And the Melius is but supplimental; & per Curiam, were the matters the same that were found, and only difference in the value, it would be dependant upon the former; and though here the Melius is of Cart and Horses, and Enquest was but of Cart; yet its all one; for the Principal is the death of the Man which is excepted, and by consequence all the matters depending thereon: And the Defendant should answer to the former value if there had been no Melius; and so he shall to the later which depends thereon. Sed adjornatur.

Macmely *and* Bird.

(22) Ireland. ERror out of Ireland on Judgment in C. B. in Replevin; the Defendant made Conusance, as Bailiff of Vicountess Mayo, for arrears of Annuity granted by Vicount Mayo; the Plaintiff replieth that Vicount Mayo was not seised, and Issue thereon, Special Verdict find the Commissioners at the same time adjudged the place of the taking to the Vicount by Certificate, October 1666, and Inrollment and Proviso in the Statute Car. 2. Cap. §. of Explanation, as 23 Octob. 1641. possest by the Vicount or his Ancestors; by Vertue whereof the Vicount entred: And after it was held by Blake as Souldiers arrears, after which Octob. 1666, before other Entry the Vicount granted to the Vicountess the Rent. And by Offly for the Plaintiff, he shall be said seised by the first Adjudication and not by the later Certificate only, for the Souldiers were but Tenants at will. 2. The Act is to restore to the 22d of Octob. 1641, and the Commissioners restore from the

the 23d of Octob. 41 which if it be any objection, would destroy all the Proviso men; for that the King was to be seised from the 23d of Octob. 41. and also this is only an affirmative clause, so 3 Inst. 141. being as a restitution shall be most favourably intended: Also the Defendant cannot take advantage hereof; for if there be no restitution the Lands are in the King, as 11 Co. 11. Pridle and Napper, Appropriation by verba de futuro, on Power to Appropriate in præsenti; yet held good enough, so 1 Cr. 91. this being only description and no Negative words, and the Verdict finds there are no other Lands to be restored to but these, and the Certificate is only pursuant to the Act; and therefore the party is in by the Statute, not by the Decree or Certificate, as on grant of Administration, 21 H. Cap. 5. §. the party is not in by the Ordinaries grant; but by the Act, the Commissioners being but ministerial. Levins for the Defendant in the Writ of Error, The Avowry is for Rent granted the 2d of June 1666, and Issue on Seisin at the day, Special Verdict find Lord Mayo Petitioned the 11th of April 18 Car. 2. and the Decree then made, but Lord Mayos Entry is found in Octob. 1666, which was after the grant of the Rent: And that Blake by the final Establishment held the Lands untill the 22d of Octob. 1666, and its not found the Vicount or his Father were ever seised of these Lands, and the Certificate that his Father was seised the 23d of Octob. 1641, this is not within the Statute, for its not said whereof A. was seised, the 22 of Octob. 1641, or any time after; but this should be found by Jury, see Irish Acts pag. 20. 21. 4. all the Lands are vested in the Crown, but of persons Innocent, and it appears not that Lord Mayo was so, but hath the Lands given by Special Proviso, pag. 54. and the Act intended the Certificate only to enable to have Patent of the Lands, and 2 Act pag. 4. 17. therefore unless the Patent be delaied six months, the party is not in by the Act or adjudication, and it doth not appear here was any delay of Patent, and within the six months there could no Estate pass by the adjudication; and so Lord Mayo could not grant the Rent. Raynsford Chief Justice, The avowant Plaintiff in the Writ of Error hath a hard Case, for there must be something to take the Estate out of the King, which this Certificate doth not, being not pursuant to the Power in the act of Explanation: also the adjudication of the Commissioners is no restitution of it self, but only Introductive of a Patent; and this Rent would be stated in the Patent which could not be in the adjudication, but in case of delay six months, the Decree is to be a restitution, but not else, and here not six months between the

the Decree and the grant of Lord Mayo. Sed adjornatur.

Buller *and* Waterhouſe. *Friday*, February 8. Ante.

(23) Colluſion.

LEvins for the Defendant, The Court is not to Judge of Fraud, but of a Proviſo of a Statute they are, as on 52 H. 3. C. de His qui primo genitos feoffare ſolent, and 2 Brownl. 190. and 27 Eliz. Cap. 4. doth not ſay it ſhall be Fraud, but that it ſhall be void within that Proviſo. 2. This Proviſo of the ſettlement is not at the Will and Pleaſure of the Conveyor, but at the Will of Truſtees, yet it is within the meaning of the Statute, as well as 3 Co. 82. Standen and Bullock, and power to revoke by conſent of J. S. Bridgm. 23. pl. is a Power within the Statute, Lane 22. and that its found the Truſtees are Relations of the Sons Wife, yet this is only as to the eighty Years limited for her Joynture, and nothing to the Inheritance; for here the Son alſo is to revoke by conſent of the Truſtees, which is Idle as to the Son who had the Fee Simple, and here the Leaſe for eighty Years is Surrendred; and the ſingle queſtion is if the Mother againſt her own ſettlement in Marriage ſhall defeat the Son. Sed adjornatur.

Staugton *and* Green.

(24) Covenant.

IN Covenant to repair Malthouſe on Leaſe of Meſſuage, Malthouſe and Tenement, the Breach is aſſigned in not repairing the Meſſuage; the Defendant pleads Entry of the Plaintiff into Tenement part of the Premiſes, and building a Wall, whereby the Defendant was expelled; to which the Plaintiff demurred.

Baker *and* Baker. Ante.

(25) Ordinary.

TRemayn praied Prohibition after Commiſſion of adjuncts in Appeal, which is granted on difference of opinion of Judges, upon adminiſtration granted to the Wife, from which the Mother appealed on Deed of Joynture, whereby the Wife was barred of all her cuſtomary part, which per Curiam is no bar; Mich. 18 Car. 2. Rot. Offly and Beſt and Spencers Caſe. Mich. 26 Car. 2. Which Sarjeant Pemberton the Kings Sarjeant oppoſed, becauſe though a Prohibition lieth on Citation to Repeal after Power executed, yet never on an appeal, which is a ſuſpenſion of the Sentence of adminiſtration, ſo 1 Cr. Johns, and may well be

in

in case of residuary Legatee, or in case of Exclusion by the Dower; but per Curiam the Ordinaries Power being executed the Prohibition shall stand until it be avoided by plea, the rather because the Plaintiff in the appeal opposed, a Commission of adjuncts would not lie upon three Doctors being against two Judges on the appeal, and the Prohibition stood.

Enfield *and* Hills. *Monday*, February, 11.

(26) Mandamus.

IN action upon the Case against the Defendant for procuring a false Return to Mandamus on removal of an Alderman; After Verdict, and 300 l. damages, Maynard the Kings Serjeant excepted against Doderiges opinion in Harris's Case, that an action upon the Case will not lie, for an Alderman having no fee nor profits, 27 H. 8. 28. and in action upon the Case there must not only be a Tort but a damage thereon, 8 Co. 49. especially this being a new Office, so 3 Cr. 859. Hardy and Newland, and the Chief reason of the Case Barnardiston and Soam in Exchequer Chamber was that no action upon the Case lay on such false Return at Common-Law, being a matter of Government, and upon this Publick account a Mandamus is awarded, though this may also concern private person; and there is more consideration to be had of a Burges of Parliament than of an Alderman. 10 H. 4. 47. Wild Justice, this Court must take the Return as true, until it be disproved by action upon the Case; to which the Court inclined. Sed Adjornatur.

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